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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1967.

No. 59

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1967.
CERTIORARI GRANTED OCTOBER 9, 1967.

SUPREME COURT OF THE UNITED STATES

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1 IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

* * (Caption — No. 64 C 306) * *

PREFIX TO RECORD REQUIRED BY RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This action was commenced on February 20, 1964 by Plaintiff, Chicago Grain Trimmers Association, Inc., an employer operating under and subject to the Longshoremen's and Harbor Workers Compensation Act, and the Plaintiff, New Amsterdam Casualty Company, its Workmen's Compensation insurer, which by terms of the Act has primary liability to injured employees or their dependents.

The Plaintiffs sought to set aside an award of compensation made by Deputy Commissioner, R. C. Enos in favor of the widow and dependents of John J. Banks, a deceased employee of Plaintiff, Chicago Grain Trimmers Association, Inc.

By provision of the Longshoremen's and Harbor Workers Compensation Act the Deputy Commissioner is the actual Party Defendant and is represented in the District Court by the United States Attorney.

Agnes M. Banks, widow, and the minor children of John J. Banks, deceased, beneficiaries of the Deputy Commissioner's award, are Parties in Interest only.

2 On June 11, 1964 the answer of Defendant, Deputy Commissioner R. C. Enos, was filed.

On December 28, 1964 a Motion for Summary Judgment with supporting brief was filed by Defendant.

On March 22, 1965 Plaintiff's Motion for Summary Judgment with supporting exhibits and brief was filed.

On March 30, 1965 the Honorable James Parsons, Judge of the District Court for the Northern District of Illinois, accepted the Motions for Summary Judgment and written briefs without oral argument.

On June 2, 1965 the Honorable Judge Parsons entered an order granting Defendant's Motion for Summary Judgment, which in effect affirmed the Commissioner's award, denied the Plaintiff's Motion for Summary Judgment and adopted the Commissioner's findings of fact and conclusions of law.

On July 26, 1965 appeal was taken by Plaintiffs.

Chicago Grain Trimmers Association, Inc.
and New Amsterdam Casualty Co.
Plaintiffs-Appellants
By /s/ Klohr, Braun & Lynch
their Attorneys

3 Placita.

4 COMPLAINT TO REVERSE AND SET ASIDE AWARD OF DEPUTY COMMISSIONER AND TO IMMEDIATELY AND PERMANENTLY ENJOIN ENFORCEMENT OF AWARD

To The Honorable Judges Of The United States District Court For The Northern District Of Illinois:

The complaint of the Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co. respectfully shows to this honorable court as follows:

1. Plaintiffs, Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co. bring this action under the Longshoremen's and Harbor Workers Compensation Act (Title 33, Sec. 901, et seq. of the United States Co.) against R. C. Enos, Deputy Commissioner for the 10th Compensation District of the Bureau of Employees Compensation, Department of Labor.

2. On January 26, 1961, John J. Banks was an employee of plaintiff, Chicago Grain Trimmers Association, Inc., and on said date did perform duties upon a barge located on navigable waters of the United States.

3. Agnes M. Banks as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, subsequently filed a claim with The Bureau of Employees Compensation, Case No. 46-71 alleging that John J. Banks sustained an accidental injury while engaged in his employment on January 26, 1961 by being struck on the head by a cable which injury caused him to fall down a flight of stairs at home on January 30, 1961 causing injuries which resulted in his death on February 12, 1961.

4. After hearing the evidence of the parties, Deputy Commissioner, R. C. Enos, issued his decision on June 8, 1961 finding that the death of John J. Banks did not arise out of and in the course of his employment which appears more fully in an exact copy of said decision which is attached hereto as plaintiff's Exhibit B.

5. The award of the Deputy Commissioner was in accordance with fact and the law and no appeal or request for modification was taken by the claimants.

6. On January 30, 1961, John J. Banks was an employee of Chicago Grain Trimmers Association, Inc. and on said date did work for said employer on a barge resting in the navigable waters of the United States.

7. On or about July 31, 1961, Agnes M. Banks, widow and on behalf of James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, filed a claim with the Deputy Commissioner of the 10th Compensation District under Case No. 46-73 alleging that the death of John J. Banks on February 12, 1961 was caused by injuries sustained when he fell down a flight of stairs at his home on January 30, 1961 and said fall at home was precipitated by an accidental injury at work on January 30, 1961.

8. Upon receipt of notification of filing of said second claim No. 46-73, the employer moved to strike and dismiss the claim for the reason that it was barred by the prior final determination of the Commission in case No. 46-71 holding that the fall at home and subsequent death of John J. Banks was not related to his employment.

9. On September 21, 1961, a pre-trial hearing conference was had in the office of the Deputy Commissioner, R. C. Enos, at which time the Commissioner advised that the motion attacking his jurisdiction would not be considered or ruled upon as it presented a question of law. The Deputy Commissioner then accepted the request of counsel for claimants that a hearing on the pending claim be postponed indefinitely pending disposition of a related negligence action in the Federal District Court.

10. On September 8, 1961, Agnes M. Banks as Administrator of the Estate of John J. Banks, filed an

action in Admiralty in the Federal District Court against Norris Grain Co. under No. 61C1515 alleging that John J. Banks was injured on January 30, 1961 by the negligence of the Norris Grain Co. and said injury was the proximate cause of the death of John J. Banks on February 12, 1961 and seeking damages in the amount of One Hundred Thousand Dollars ($100,000). Thereafter on
7 trial, a verdict was returned in favor of Agnes M. Banks, Administrator, in the amount of Thirty Thousand Dollars ($30,000).

11. Thereafter, Norris Grain Co. filed a motion for a new trial which the court ordered to stand as granted unless the libelant within 10 days from May 10, 1963 accepted and entered in the record a remittitur in the sum of Eleven Thousand Dollars ($11,000) which order more fully appears from plaintiff's Exhibit C attached hereto. On May 17, 1963, libelant, Agnes M. Banks, Administratrix, accepted the remittitur of $11,000 and asked that judgment be entered for Nineteen Thousand Dollars ($19,000) and thereby forgave the right of Agnes M. Banks and her minor children to a new trial seeking damages of $100,000 as originally prayed.

12. The voluntary acceptance of the $11,000 remitterer was made without the knowledge and without the written consent of the employer, Chicago Grain Trimmers Association, Inc.

13. On August 29, 1963, the second claim of Agnes M. Banks was called for hearing before the District Commissioner, motion was made challenging the jurisdiction of the Commissioner on the ground that the claim was barred by a prior and unapproved settlement of a third

party claim according to Title 33, Sec. 933 (g) and was also barred by a prior final determination of the District Commissioner. The motions were accepted by the Commissioner but not ruled upon and evidence was had on said date and on subsequent dates, proofs being closed and the matter being taken under advisement on October 1, 1963. The testimony heard by Deputy Commissioner, R. C. Enos, in both cases was transcribed in a record which record is in the possession of the defendant, Deputy Commissioner, R. C. Enos, and the plaintiffs request that said record by ordered to be filed in this cause and to be referred to as Exhibit A and be taken and read as a part of this complaint.

14. On January 27, 1964 findings of fact and an award of compensation were entered by District Commissioner, R. C. Enos, granting compensation benefits to Agnes M. Banks as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, all of which fully appear on said award and findings of fact attached hereto as plaintiff's Exhibit D.

15. The award to Agnes M. Banks, as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, by defendant, R. C. Enos, was not in accordance with law in that:

1. The claim for deficiency compensation filed on July 31, 1963, case No. 46-73, was barred by prior settlement not approved by the employer as provided in Title 33, Sec. 933 (g), United States Code.

2. That the findings of fact made by the Deputy Commissioner are not supported by substantial evidence and

are contrary to the evidence presented to the said Deputy Commissioner.

3. That the claim is barred as a matter of law for the reason that the issue as to whether the death of John J. Banks was related to his employment was finally decided in a prior decision of the Deputy Commissioner.

4. That the Commissioner failed to rule and made no finding concerning the employer's motion that the claim was barred as a matter of law.

5. That even upon awarding compensation, the Commissioner erroneously computed the credit to which
9 the employer would be entitled if the claim were not totally barred.

Wherefore, the plaintiffs pray that:

1) Process issue in due form against defendant, R. C. Enos, Deputy Commissioner, requiring him to answer the exigencies of this complaint.

2) That an interlocutory injunction issue out of this court enjoining payments due under the order of the Deputy Commissioner.

3) That an order issue that the transcript of proceedings before said Deputy Commissioner be sent to this honorable court for review.

4) That the plaintiffs have such other and further relief required to vacate and set aside the findings of fact and the award of the Deputy Commissioner.

Chicago Grain Trimmers Association, Inc.
and New Amsterdam Casualty Co.
By /s/ Klohr, Braun & Lynch
Attorneys for Plaintiffs

Mark A. Braun being first duly sworn says that he is one of the attorneys for the plaintiffs above named; that he has read the foregoing petition and knows the contents thereof and believes the same is true and correct.

/s/ Mark A. Braun

10

EXHIBIT "B".

COMPENSATION ORDER.
REJECTION OF CLAIM.
CASE NO. 46-71.

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with the law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on January 26, 1961 the employee above named was in the employ of the employer above named on board a barge afloat upon the navigable waters of the United States at the employer's dock, Chicago, Illinois, in the Tenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for
11 compensation under the Act was insured by the New Amsterdam Casualty Company; that on said date the employee herein was employed as a "button man" or operator of a mechanical shovel attached to steel cables one-half inch in diameter, the steel cables being used to pull the shovel, via electrical energy and blocks and tackles, in the operation of unloading grain; that during the afternoon of said date one of the cables attached to

the shovel the employee was operating broke; that the cable was replaced and the employee finished the day's employment in the usual manner; that none of the other employees working on the job that day had any knowledge that John J. Banks had been struck by a broken cable or had sustained an injury of any kind as a result of the broken cable; that after work on said day the employee accompanied a coworker to the company office and was observed by the coworker to have a small red scratch on the left side of his forehead; that on arrival at his home on said date the employee told his wife he had been hit by a cable that afternoon; that his wife lifted his hat, examined the left side of his head, and saw nothing unusual; that later in the evening of said day the employee complained of headache and took one or two aspirin tablets for relief; that at the time the aspirin was taken a visitor in the home observed a small black spot the size of a pencil dot on the left forehead, about one inch above the outer aspect of his left eyebrow; that the employee made no complaints with respect to his head thereafter; that the employee returned to his usual duty on Friday, January 27, 1961, and performed in his usual
12 manner; that Saturday and Sunday, January 28 and 29, 1961, respectively, were nonworkdays and were spent by the employee quietly at home; that the employee worked on Monday, January 30, 1961, in his usual manner and with no complaints; that after work was finished on January 30, 1961 the employee reached his home at approximately 4 p. m.; that his wife was in the basement of their home washing and ironing; that approximately 30 minutes after his arrival at home the employee went to the head of the basement stairs and called to his wife

that he wished to ask her something; that his wife then looked up from where she was standing in the basement and observed him to stiffen and pitch forward, head first, down the basement stair, landing on the right side of his head on the concrete floor of the basement; that the employee died February 12, 1961 as a result of the injuries incurred in the fall on January 30, 1961; that on February 20, 1961 Agnes M. Banks, surviving wife, filed a claim against the employer on behalf of herself and her three minor children, James M. Banks, Janice M. Banks, and Catherine M. Banks, for death benefits provided by the Longshoremen's and Harbor Workers' Compensation Act, alleging that the fall which caused the employee's death was a consequence of an injury sustained on January 26, 1961, and which arose out of and in the course of his employment; that considering all the facts and surrounding circumstances it is not established that the employee's death was the result of an injury which arose out of and in the course of his employment on January 26, 1961.

13 Upon the foregoing findings of fact, It Is Ordered by the Deputy Commissioner that the claim for death benefits be and it is hereby rejected for the following reason:

1. The death of the employee did not arise out of and in the course of his employment.

Given under my hand at Chicago, Illinois, this 8th day of June, 1961.

/s/ R. C. Enos
Deputy Commissioner

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing Compensation Order has been sent by registered mail to the following-named parties at the last known address of each:

Mrs. Agnes M. Banks, 3520 East 112th Street, Chicago 17, Illinois

Herbert H. Moses, Esq., 2945 East 91st Street, Chicago 17, Illinois

Chicago Grain Trimmers Association, Inc., Lake Calumet Transit Dock No. 1, Butler Drive, Chicago 33, Illinois

New Amsterdam Casualty Company, 175 West Jackson Boulevard, Chicago 4, Illinois

Klohr, Merrick, Braun & Lynch, 105 South La Salle Street, Chicago, Illinois

/s/ R. C. Enos
Deputy Commissioner

Mailed: June 8, 1961.

14 EXHIBIT "C".

Name of Presiding Judge, Honorable John W. Holland.

Cause No. 61 C 1515. Date 5/16/63.

Title of Cause: Agnes Banks, Admtr. v. Norris Grain.

Brief Statement of Motion: Libelant motion to accept $11,000 remittitur and enter judgment in the sum of $19,000.00.

Names and Addresses of moving counsel: Harold A. Liebenson.

Libelant accepts $11,000.00 remittitur. Enter judgment for libelant for $19,000.00 and costs.

A true copy teste
Elbert A. Wagner, Jr.
Clerk
By /s/ Dorothy Aldridge
Deputy Clerk
Sept. 6, 1963

15 Name of Presiding Judge, Honorable John W. Holland.

Cause No. 61 C 1515. Date May 9, 1963.

Title of Cause: Agnes Banks, Administrator, etc. v. Norris Grain Company.

Brief Statement of Motion: Hrg. on post trial and post judgment motion, if any, and deposition of Motion of respd. for directed Verdict at close of libelant's case now under advst.

Names and Addresses of moving counsel: Director & Liebenson, 77 W. Washington (2) Representing Libelant.

Names and Addresses of other counsel entitled to notice and names of parties they represent: Hinshaw, Culbertson, Moelmann & Hoban, One N. LaSalle St., Chgo. 2.

Argts. hrd. Mo. of respdt. for directed verdict made at close of Libelant's case denied. Motion of respdt. to set aside verdict and jdgt. entered thereon and to have jdgt. entered in accordance with respdt's. mo. for directed verdict denied. The respdt's. Mo. for New Trial will stand granted unless the libelant within 10 days from this date enters in the record a remittitur in the sum of $11,000.00.

A true copy teste
Elbert A. Wagner, Jr.
Clerk
By /s/ Dorothy Aldridge
Deputy Clerk
Sept. 6, 1963

16 EXHIBIT "D".

COMPENSATION ORDER
AWARD OF DEATH BENEFITS
CASE NO. 46-73 (FATAL)

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with the law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on January 30, 1961, John J. Banks, hereinafter referred to as "employee," was in the employ of the employer above named, at Chicago, Illinois, in the Tenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for compensation under the said Act was insured by the New Amsterdam Casualty Company; that on said date the em-
17 ployee herein while performing service for the employer as a grain trimmer aboard a barge afloat upon the navigable waters of the port of Chicago sustained an injury which caused disability, as a result of which he died on February 12, 1961; that the original injury occurred when a rope (1-inch in diameter), which was attached to a power shovel the employee was using to move grain, broke high up on a marine leg causing the rope to coil and fall a distance of approximately 50 feet from the point of breakage, striking the employee on the top of the head and as a consequence he suffered an acute subdural hematoma which, some two hours later, caused him to fall forward down a flight of basement steps at his home resulting in multiple injuries, including a basal

skull fracture, which caused his death on February 12, 1961; that the injury and death arose out of and in the course of the employment; that written notice of injury and death was not given to the employer within thirty days, but that the employer had knowledge of the injury and death and has not been prejudiced by the lack of such written notice; that emergency medical and hospital treatment was obtained and arranged by the employee's family, the reasonable cost of which is a liability of the employer and the insurance carrier; that the average weekly wage of the employee herein at the time of injury and death exceeded $81.00; that Mrs. Agnes M. Banks, who was born August 24, 1916, and was married to the decedent on November 16, 1935, is the surviving wife of the employee and as such she is entitled to death benefits at the rate of $28.35 per week (35 per cent of $81.00), beginning February 13, 1961, subject to the provi-
18 sions of the Act; that James M. Banks and Janice M. Banks, both born October 21, 1947, and Catherine M. Banks, who was born December 3, 1950, are the surviving minor children of the employee, under the age of 18 years, and are entitled to death benefits at the rate of $8.55 each per week (⅓ of $25.65, which is the difference between the surviving wife's compensation of $28.35 per week and the maximum compensation rate of $54.00 per week) beginning February 13, 1961; that the payment of such death benefits shall be made to Mrs. Agnes M. Banks as the surviving wife of the employee and mother and natural guardian of the surviving minor children, subject to the provisions of the Act with respect to continuing dependency, age, maximum weekly rate of compensation, and the credit remaining from the recovery made against the third party responsible for the death

of the employee, the findings of which will be set forth herein; that funeral services were rendered on behalf of the employee by Claude E. Griesel Mortuary, 10240 South Ewing Avenue, Chicago, Illinois, the charge for which amounted to $2,606.82; that the employer and the insurance carrier are liable for the payment of $400.00 as reasonable funeral expenses; that a suit was entered in the United States District Court for the Northern District of Illinois, Eastern Division, by Mrs. Agnes M. Banks as administratrix of the estate of John J. Banks, on behalf of herself and the surviving minor children of the employee, against the Norris Grain Company as a third party responsible for the death of the employee; that as a result of the lawsuit against the third party a gross recovery in the amount of $19,000.00 was obtained;
19 that the employer and the insurance carrier are not liable for the payment of deficiency compensation, as provided in section 33 of the Act, until the amount of the recovery against the third party is absorbed or liquidated by the allowable expenses incurred in connection with the suit and the accrual of death benefits which exceed the amount so recovered; that the allowable expenses in connection with the lawsuit are as follows:

1.	Attorneys' Fees	$6,333.00
2.	Testimony of Dr. I. Joshua Spiegel	300.00
3.	Court Reporter	312.35
4.	Investigation	15.50
5.	Photographs	12.00
6.	Witness Fees	143.48
7.	Court Costs	17.20
8.	Copy of Court Order	1.25
	Total	$7,134.78;

that the accrued death benefits are as follows:

Medical Treatment, Dr. Otto Koehler	$100.00
Medical Treatment, Dr. I. Joshua Spiegel	75.00
South Chicago Community Hospital	488.55
Reasonable Funeral Expenses	400.00
Total	$1,063.55;

that the expenses of the lawsuit and the medical, hospital, and allowable funeral expenses amount to a total of $8,198.33; that after the deduction of $8,198.33 from the gross recovery of $19,000.00 there is a credit balance of $10,801.67 from the third party recovery; that each of the three surviving minor children was awarded by the court in his or her own right the sum of $801.23, or a total of $2,403.69, which was paid to Mrs. Agnes M. Banks as administratrix of the estate of John M. Banks and which amount has been placed in a bank for the three surviving minor children; that the net third party credit in the hands of Mrs. Agnes M. Banks, on her own behalf as the surviving wife of the decedent, amounted to the sum of $8,397.98 after credit for the above-stated deductions; that such net third party credit will be absorbed by the accrual of death benefits on October 18, 1966; that the accrued death benefits due the three surviving minor children from February 13, 1961 to January 26, 1964, inclusive, are 154 weeks and at the combined rate of $25.65 per week (3 x $8.55 each) amount to $3,950.10; that after deducting the sum of $2,403.69 (3 x $801.23, the amount each surviving minor child recovered against the third party), there is a balance of $1,546.41 due; that nothing has been paid by the employer and the insurance carrier as death benefits.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD.

That the employer, Chicago Grain Trimmers Association, Inc., and the insurance carrier, New Amsterdam Casualty Company, shall pay to Mrs. Agnes M. Banks on behalf of James M. Banks, Janice M. Banks, and Catherine M. Banks death benefits for 154 weeks at the combined rate of $25.65 per week from February 13, 1961 to January 26, 1964, inclusive, which amount to the sum of $3,950.10, from which is to be deducted the sum
21 of $2,403.69 (third party recovery), leaving a balance of $1,546.41 due and payable in one sum forthwith, payments thereafter to continue in biweekly installments at such combined rate subject to the provisions of the Act. That the employer and the insurance carrier shall on October 18, 1966 commence the payment of death benefits to Mrs. Agnes M. Banks on her own behalf at the rate of $28.35 per week, and continue such payments in biweekly installments subject to the provisions of the Act.

A fee in the amount of $700.00 is approved in favor of the firm of Director & Liebenson, 77 West Washington Street, Chicago 2, Illinois, for legal services rendered in presentation of the claim, such fee to be a lien against and deducted from the compensation due.

Given under my hand at Chicago, Illinois, this 27th day of January, 1964.

/s/ R. C. Enos
Deputy Commissioner

22 Proof of Service.

23 **ANSWER OF DEFENDANT DEPUTY COMMISSIONER**

Defendant, R. C. Enos, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, 8 and 14.

2. Admits the allegations contained in paragraph numbered 7, save the allegation with respect to the date of filing of the claim which defendant denies and alleges was August 22, 1961.

3. Neither admits nor denies the allegations of paragraphs 9, 10, 11, 12 and 13 since all the evidence with reference thereto is contained in the record of the proceedings before the deputy commissioner here under review, to which record, when filed, the Court is referred.

24 4. Denies the allegations contained in paragraph numbered 15.

5. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

Wherefore, defendant deputy commissioner prays that the complaint be dismissed.

/s/ Edward V. Hanrahan
United States Attorney

25 Affidavit of mailing.

TRANSCRIPT OF PROCEEDINGS, CASE NO. 46-73

U. S. Department of Labor, Bureau of Employee's Compensation

(Testimony started August 29, 1963)

A March 6, 1964—Letter of Certification and Transmittal of Deputy Commissioner Enos to Frank E. McDonald, United States Attorney, Under Case No. 46-71 included in pages 1 through 304 and transcripts of testimony under case No. 46-73 included in pages 1 through 263.

B Index of Witnesses in Proceedings Before Commissioner on August 29, 1963 and October 1, 1963. Case No. 46-73.

1 Proceedings in the case of Agnes M. Banks, surviving wife and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, as claimants against Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, carrier, were commenced before Deputy Commissioner, R. C. Enos of the 10th Compensation District at 10:00 A.M. on August 29, 1963. Present was Attorney Harold A. Liebenson for claimant and Mark A. Braun for the employer-carrier.

2 Deputy Commissioner Enos: This is a hearing on the application of Agnes Banks for herself as widow and for her three (3) minor children under the Longshoremen's and Harbor Workers' Compensation Act for death benefits provided by the Act

alleging that John Banks died on February 12, 1961
3 as a result of injuries sustained on January 30, 1961 while employed as a grain trimmer. Administrative reports on file with the Commissioner revealed that on January 30, 1961, John J. Banks was employed by the Chicago Grain Trimmers Association, Inc. at a wage in excess of $81.00/week and on said date was employed aboard a vessel which was afloat on the navigable waters of the United States and while so employed on January 30, 1961 allegedly sustained injuries which caused his death on February 12, 1961.

Reports further reveal that a law suit in the Northern District of Illinois against Norris Grain Company resulted in a jury verdict of $30,000 damage in behalf of Agnes M. Banks, administratrix for the Estate of John J. Banks. The presiding judge, John W. Holland, released an order on May 16, 1963 reducing the judgment to $19,000, with a remittitur of $11,000.

4 The issue here is a claim for a deficiency compensation award under Section 33 of the Longshoremen's and Harbor Workers' Compensation Act. The liability under the Longshoremen's and Harbor Workers' Compensation Act was insured by New Amsterdam Casualty Company and the employer and its carrier have filed a notice of controversion of the claim on September 21, 1961 contending that the claim for benefits because of the death of John J. Banks were determined under the Decision of Commissioner R. C. Enos of June 8, 1961. The findings of the order of June 8, 1961 pertain to a claim for benefits as a result of an injury alleged to have been sustained on

January 26, 1961. The current claim involves an injury alleged to have been sustained on January 30,
5 1961. Because of the different date alleged and under different circumstances, a hearing on the claim is justified.

Mr. Braun: I would like to have the record show that the controversion filed by the employer also contends that there was no accidental injury on January 30, 1961 and there is no causal relationship between an alleged incident and the subsequent injuries sustained by decedent in his home.

6 Mr. Braun: The employer wishes to present a formal motion setting forth in greater detail and with exhibits the facts surrounding the settlement of the Federal Court action and the acceptance of the plaintiff of $19,000 in settlement in lieu of a new trial.

7 Mr. Liebenson: I would like to file an answer.

Deputy Commissioner Enos: Permission to file an answer granted. I will give you ten (10) days if you want it.

8 Mr. Braun: A further contention of the respondent that this proceeding is barred because of the preceding hearing is before this Commission in the nature of a formal petition.

Deputy Commissioner Enos: I don't believe I have a formal petition but you have stated that is your position and it can always be developed to a greater degree at a later date by briefs.

9 Mr. Braun: I want to make certain that my participation in this hearing will not waive any of the objections we have to the jurisdiction of the Commission or any other of the defenses.

Deputy Commissioner Enos: That's understood.

It is agreed by the interested parties that the relationship of Agnes Banks and the three children: James, Janice and Catherine Banks, under the age of 18 years, would be accepted by the Carrier as surviving beneficiaries entitled to the benefits, if any.

10 The death certificate is received in evidence as claimant's exhibit 2.

9-19 Discussion between Commissioner and attorneys regarding medical expenses incurred on behalf of decedent as well as court costs, including cost of expert witnesses in Federal Court case and allocation and distribution of proceeds of settlement of Federal District court action.

20 Mr. Liebenson: I submit the Coroner's record of the last page of Coroner's record.

21 Deputy Commissioner Enos: It's questionable whether it is submissible but I am admitting it for what it is worth.

22 Petitioner's Exhibits 4, 5, 6 and 7 were identified being photographs. It was agreed that the Coroner's Protocol, claimant's Exhibit 3, would go into evidence, including the pathological report and protocol on John Banks. They are admitted only as things that the person making the document would testify to if he were present in person.

MIKE MIRAMONTEZ, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

I worked as a grain trimmer on January 30, 1961. That was a Monday and I worked at Norris Elevator. Claimant's Exhibits 4, 5, 6 and 7 shows where I was working at Norris Grain Elevator on January 30, 1961 and correctly portray that elevator. We were suppose to start working at 8:00 but sometimes it would take an hour or so to get the barge ready to move it. We starting working pretty close to 10:00 o'clock. On that date, Johnney Banks was the boss and my job was pulling the rope. Using claimant's Exhibit 8, when the barge comes in, the marine leg is lowered into the barge. There are buckets in the marine leg that pull the grain up to the elevator. There is a rope or shovel at each corner of the marine leg bringing the grain to the bucket. When they want to bring grain to the shovel, they pull a rope and throws a clutch in which pushes this shovel. There are 4 shovels and 1 rope controls each shovel. The man running the shovel is called the tripper. He has two lines, one to push the clutch in and one to release the clutch. On the marine leg there are at least 5 sets of ropes that you can see in the picture, 4 for each shovel. John Banks was a tripper at about 2:00 o'clock, January 30, 1961. He was one of 4 trippers. I was a rope puller and it is his job to pull the rope when they bring the shovel in when they stop when they get to the bottom. He pulls the rope down after the shovel reaches the marine leg to loosen it so that they can bring the shovel back again. I was

working on the left side of Mr. Banks. I was about
32 20 inches from him. The rope that is handled by the puller comes from the top. They had drums up there.
33 The pulleys are about 50 feet from the ground. The rope goes in at that point and goes far back to the drums and the drums are attached to motors. The rope we use for the shovels is about 1 inch, I think.
34 It's regular rope. It's twine. It is not nylon. I guess that 50 feet of that rope would weigh more than 30 pounds.

35 Mr. Braun: I object to both guesses as to distance and his guess as to weight.

John Banks was standing to my left and you know that it broke. The whole thing, a big pile of rope come.

Mr. Liebenson: Where did the rope break?

A. Well, it breaks on the top, on the inside. When
36 it broke it came fast, you know, and it piled, you know, a big pile.

When it came down, it's round, rolling down. (Indicating like a circle.) When I saw it when it stopped, you know, I looked at the man. He was on my left. The whole pile come on top of his head. That was Johnny Banks. He was wearing a hat or a cap. When the rope hit him, he went forward and down.
37 After he went forward and down, he got the rope off
38 his head and started rubbing his head. When a rope breaks, they fix it. It was 25 to 30 minutes before
39 the rope was fixed and during that time, John Banks rubbed his head. We then went back to work and we work until sometime before 4:00 o'clock. After January 30, 1961, two men came to my house to take a statement. Claimant's exhibit 9 showing to witness.
41 I can't hardly read.

Exhibit rejected unless the witness could identify
43 it. I figured the rope that hit Mr. Banks was pretty close to 30 pounds but it's hard to tell. They keep the rope on the inside of the house. Sometimes they stay out there. It all depends. I don't know if it was dry or not. The rope fell close to 50 feet from where it come out. It must be from there, from the wall up there, see, yet are the drum is, and I can't
44 tell you where, what part of it broke. After I left work at about quarter to 4:00, everybody went home and I did not see John Banks.

Cross Examination by Mr. Braun.

45 On January 30, 1961, I worked at Norris Elevator. The rope from the shovel in the barge ran through a block into the marine tower. The rope comes from
46 the tower and goes down to the bottom of the leg in the barge. My job was to pull the rope from the tower and pull it down so it would be slack in the barge and the rope came through my hands many times on January 30 and it was dry. I don't know if
47 it was dry. I use gloves handling it. It could be dry because I don't think it was wet. And I don't pay any attention if it is wet. It's hard to tell. When I was pulling the rope, I would be looking into the barge. I would not be looking at Mr. Banks, and I
48 wouldn't be looking at the marine tower either. I didn't see the rope break and nobody saw it break and I don't know where it broke. If the rope broke right at the barge or half way up to the tower, the top half would be drawn up into the tower. But on
49 January 30th, I didn't know where it broke.
50 I had just guessed that it was 50. Judging from the photograph, it could be less than 25 feet from

the ground to where the rope goes into the tower and John Banks was standing on the level of the barge which was a little higher than the ground. I said that the incident when the rope broke happened sometime after 2:00 o'clock, 2:00 or 2:30. It could have been as late as 2:30. It took about a half hour to fix the rope and then we went back to work. After that, we worked almost 2 hours, close to 2 hours. It was about an hour and a half that we worked after they fixed the rope and John Banks worked with me until we finished the barge. John Banks worked during that time and he didn't make any complaint and I didn't see any marks, cuts or bruises on him. When the rope broke, I was looking down into the barge and I didn't see it break. When it fell, some of the rope hit me on my side, my left shoulder. The first time that I knew a rope was broken was when I saw the shovel stop. I was looking down into the barge. When the shovel is moving through the grain, the tripper can pull his rope and stop it at any time. When some of the rope touched me, I turned around. I did not turn around before the rope hit me because I was looking down. When I turned around, John Banks was right next to me. I saw rope on the top of his head. You know, it was the rope hit me, you know. I stands up and look around. When I looked around, his hands were on the hatch cover. They went down on the top of the barge. The hatch cover is approximately three or four feet higher than the part we were standing on so a man can put his hands forward right onto the hatch cover and when I first saw John Banks, he had his hands on the hatch cover. When I saw him with his hands on the

hatch cover, the rope was still piled up on his head. It looked like a pretty good size pile. I don't know how to explain it. It was coiled up tight, like a ball on top of the man's head. It was just a round pile. It's kind of hard to explain. He brushed the rope off himself and stayed standing there on the barge.
63 He kept working in his normal fashion after that, the same way he worked before. We all reported to the elevator at 8:00 o'clock. John Banks was with me at 8:00 o'clock. He was there with me all that
64 day. John Banks was the boss and he stayed with us from 8:00 o'clock until we went home. We went home before 4:00 o'clock but I can't tell how long before that. Some of the elevators we work at use cables and some use ropes. At Norris, we used ropes and there are some other places that used ropes. I
65 have worked with rope many times. I have seen them break many times. A lot of times these ropes have hit me. When they fall they come on the top of the man. They come all over but I didn't see them on
66 the head. A few years ago, one hit me and almost knocked me down (indicating back of head and neck). That was a number of years ago. I was working at Wisconsin Steel. After that I continued to work that day.

There was only one time that I saw John Banks get hit on the head with a rope and on that day, I worked with him from 8:00 o'clock until the end of
67 the day, until quitting time. On April 8 some men came out to see me. They asked me questions. As far as I know, I told him I worked with John Banks that day from 8:00 o'clock 'til quitting time and that we quit about 2:30 in the afternoon and that

we worked another hour after they fixed the rope. Something like that I figure, I don't remember if I told that or not. On that date John Banks had a
68 cap on and it was winter time and it was cold. It was a wool cap. He never used ear-flaps if he had them they would be turned up on the top of the cap.

I don't know who was working the shovel on the rope that I was pulling.

Cross Examination Completed.

69 *Examination of Witness Miramontez by Deputy Commissioner Enos.*

MICHAEL McANDREWS, Witness for Claimant, testified:

72 *Direct Examination by Mr. Liebenson.*

My name is Michael McAndrews. I have lived at 1229 West 79th Street for 14 years. On January 30, 1961, I was working at the Norris Grain Elevator.
73 On that day, I was tripping in. They have four trippers on each elevator. I was on the South end of the barge and I was facing the marine tower. About 2:00 o'clock in the afternoon, I was looking down to see where my man was going when I heard this crack and automatically I looked up and there everything was coming down. When I say crack, I mean rope crack. Up above, looked like it was up above. All at once I saw the rope way down on top of Johnny.
74 I'd say maybe 50 or 60 feet of rope was on him. It first struck his head, everything come right down on top of him.

I have worked this same type of rope before. I figured the rope weighed about 20 or 25. After the

rope hit him, he caught the rope and jumped off the barge and all he said was "Damn it, Damn it, it hurts, it hurts." After his rope broke, I continued to
75 work as my shovel was still operating. I don't know if the rope was wet or dry.

Whether a rope breaks all depends on the weather, sometimes a month or maybe 6 months you have a job and maybe eight months you have another job.

Cross Examination by Mr. Braun.

76 I worked at Norris that day. I forget the date proper but I worked that day because I was on the job. I can't remember right off hand the date this happened. It's so long ago I can't tell the exact date but I know it was in the Fall of the year. That I know. When I say the Fall of the year that could be November or December and there was only one time that I saw anything fall on Johnny Banks.

77 Norris is at 98th and River. We got to the job a little late, about 9:00 o'clock or maybe 10:00 because we finished one hatch at Calumet Elevator.

We finished work around 2:00 or 2:30.

I don't remember whether when I testified in the Federal Court I testified that we quit just before
78 4:00 o'clock. We only worked about a half hour after that happened and I think of it as happening in the Fall of the year.

When I was working on this barge, I was looking down into the barge at the shovel and I did not see the rope break. All I heard was a noise and I don't know at what point it broke. I know it broke above that shiv in the house but I didn't see it break. When I first saw it it was practically all down on top of him. The rope was on top of Johnny when I saw it.

79 It was near the ground not more than 6 feet from the ground. It happened like this: As soon as you look up, she's down. It's hard to explain. The first thing I heard was the crack and everything was all over. Johnny was covered. That's it. Did I see the rope fall on him? Yes, it was falling. I saw it when it was falling. The whole thing comes so quick.

80 The only way I can answer is to say that I am tripping in here like this. When the rope cracked, that came down like this, come across and hit him. The rest bounced on and came right down on top of him. That's all I see. I wouldn't say it was all together just sitting on top of his head. I couldn't say

81 that 50 feet of rope all coiled up. I said the whole thing come down on his head. I think it was about 50 feet at least but I wouldn't say 50 feet fell down and coiled up on his head. He had to fight it off his body. It coiled all over his body but I couldn't say the whole the whole works on his head. There was a

82 whole lot of it on his head. It's hard telling whether it was it was three feet. I'd say the whole works hit him. What missed his head—he was covered with rope. I think it was 50 feet that fell. It's hard telling how much went on his head. He had to get out from under the rope and immediately after that, he jumped back on the dock.

83 On the date I talked about, I don't remember who was on my shovel down in the barge but Johnny was the boss at Norris that day. Sometimes the boss leaves the job shortly before it's finished to call the office for the next days assignments. I can't recall if

84 John Banks did that on this day. He did work for awhile after the rope fell. He worked until the job

85 was finished. I couldn't say whether John Banks

called in that day because I was busy running my shovel.

86 I have known John Banks for many years and I knew Mrs. Banks through Johnny. I went to the wake but at the wake I didn't mention anything about this rope to Mrs. Banks when I talked with her and I didn't mention anything about the rope until 1963.

87 John Banks usually wore a cap when he went to work. These were heavy caps and that cap did not fall off and it stayed on when he jumped over onto the dock and he had earlaps on that day. It was a cold day. I had a jacket on with a hood on and that
88 hood was up over my head and I had a cap on plus the hood over it. John Banks just had a cap on.

After this day, I continued to work regularly on the docks for Chicago Grain Trimmers. I was a member of the Grain Trimmers Association as was John Banks and for 2 years after this happened, I never mentioned the rope incident to anybody. After it happened I didn't see any marks or bruises about
89 John Banks. I was asked about the weight of that rope today and my answer was just a guess.

90 *Redirect Examination by Mr. Liebenson.*

The last time that I ever saw John Banks work was the day of this incident. No, no, no, I had never been sociable with John Banks' family, that is, to go out with them.

91 *Recross Examination by Mr. Braun.*

John Bank's brother works for the same company that I do. I didn't see John Banks' son frequently. I worked with him maybe twice a year. It all depends upon what job your on.

94 AGNES BANKS, witness on her own behalf, testified:

Direct Examination by Mr. Liebenson.

My name is Agnes Banks. I am the claimant and I am the widow of John Banks. He was 49 at the time of his death. He was 5 foot ten and a half and weighed between 175 and 180. His occupation was that of a grain trimmer which is work he went into regularly in 1934. Prior to his death, he has been in good physical condition and had not been under the care of a physician for at least 3 years. About 4:30 in the afternoon on January 30, my husband
95 came home. Mr. Whalen was with him. I was in the basement and they came to the basement. John did not tell me right out where he had been and he did not say anything about a tavern. When I observed him, he was sober. He came to the stairway
96 and said he had brought company. I was pressing pants. He and Mr. Whalen came down stairs. After the pants were pressed we went back up. He carried Leesa up the stairs. Then he asked Mr. Whalen if he wanted a beer and I went back downstairs to my washing machine. In the meantime, Whalen son picked
97 him up and John came to the stairway. There are 11 stairs from the first floor to the basement. They are normal width for a home. He said "Ag, I want to tell you something," but he never got to tell me. He never said another word. He came down. He
98 came forward and when I seen his body coming straight this way, I went like this, but I didn't help him at all.

Deputy Commissioner Enos: You're saying, Mrs. Banks, that he pitched forward from an upright, straight position.

The Witness: He came from the top of the stairs without touching the stairs and came right through the air. His arms were toward his side, just like he was talking to me. He did not do anything with his arms and he did not cry out either. I ran upstairs
99 and called Tommie. He was unconscious. His eyes were closed and he didn't answer. I called other members of the family. The pulmotor was called.
100 He was taken to South Chicago Hospital. He remained there to February 12, 1961. To my knowledge, he never regained consciousness to the full extent when I saw him during that time.

101 Deputy Commissioner Enos: May I inquire Mrs. Banks, you described what happened when you came around the stairs. As I understand you to say, he went down in a forward position, he didn't even hit the stairs on the way down.

The Witness: No, he didn't. He was quiet.

Cross Examination by Mr. Braun.

102 Q. Regarding your statement about your husband's health, in this regard you will recall testifying before Mr. Enos once before, don't you?

Yes, I do and at that time, I told Mr. Enos that 3 days before on Thursday evening, he had complained of a headache and he had taken aspirin and that on the following days, Friday, Saturday and Sunday, he was unusually quiet for him. I believe that was on Sunday. I did not testify that he didn't follow his regular activity on Saturday. I said

it was Sunday. His conduct was not unusual on Sun-
103 day morning. On Sunday morning, he had asked of me to scratch his back. The manner in which he asked me was unusual and his activity of not working his crossword puzzles was unusual.

Q. And on Saturday, he simply stayed home, didn't go out at all and that was unusual, is that correct?

A. I myself am a person who is about my house.
104 I said he was home on Saturday, and I did my work as usual, but he had a day off on Saturday. I did not say I observed him on Saturday. My husband evidently wasn't as active as usual on that Saturday.
105 I don't know if it's a fair statement to say he wasn't as active as usual. He usually sat and watched television anyway so I would say that he was his own active self to a stage.

On Monday morning, he told me not to make any lunch for him. Normally, I made a lunch for him and he took a lunch. He said he wasn't taking a
106 lunch. He did not have breakfast that morning either. He drinks coffee. He didn't eat breakfast a lot of mornings. On January 30, he drank coffee but had no solid food and I did not make a sandwich for him. As far as I know, he had no food from the time he got up in the morning until the time he got home
107 but the men at work go out for rolls and coffee every morning but I was not there. After he came home that Monday evening, I had a conversation with him. He made no complaint to me about feeling ill. After we were in the basement, he opened a can of beer
108 for Mr. Whalen and one for himself but he did not touch the one he opened for himself. Mr. Whalen did not say where he and my husband had been before

they came home. The second time my husband came
109 to the top of the stairs, I was by the washing machine about 10 feet from the bottom of the stairs. When you're standing at the washing machine, you can see
110 the top of the stairs from one side. From the machine to the stairs is 10 feet but from the machine over to here is a few steps and you could look right up.

Q. What is here. I mean, I don't understand what you mean, "From the machine to here."

A. You understand all right. Here is the machine. Say there's two sides.

110-112 Further discussion about distance of washing machine from stairway.

112 When my husband fell down the steps, he never touched any of the steps, he hit the concrete floor below. He was taken to the hospital on the 30th day of January and I talked to the doctors and they asked about him generally. At about 8:30 that night, I
113 talked with the specialist. The specialist was Dr. Tinsley.

114 At the time of my husband's wake, many of his associates at the Chicago Grain Trimmers were there. None of these men said anything about a rope break-
115 ing. None of the men from the Trimmers Association mentioned anything about a rope breaking. My husband's brother and my son are very active in the Trimmers Association and my own brother whose name is Costello is also active in the Trimmers Association.

116 On January 30, my son worked with the Trimmers Association at Norris Elevator with my husband,
117 that is, my son Thomas. On January 30 when my son Tom came in the house from South Chicago he said,

"let me tell you something". He said, "Dad," he said, "He got hurt, but not to say nothing to you today." And I said, "All right, I'll make off I don't know anything." But this after he fell down the stairs, this was all forgotten. But like anything else happens in one's house, you try to remember the days goings on, and Tom said, "Ma, I told you about that on Monday," but he said, "Remember Dad, he said don't tell you."

118 It was not until later that things settled down and then Tom said, "Ma, I did tell you." That was after the funeral when he said that and we were sitting down and we were talking about different things like any family does. It would be in the month of February, 1961. It could have been near the end of February.

That conversation was had prior to the time that I testified before Mr. Enos in June of 1961.

Q. You didn't tell Mr. Enos anything about that
119 at that time, did you.

A. At that time, when I came in here, this was something that was mentioned, and it was forgotten about, and it wasn't until even after the other trials, is what I'm trying to tell you, after the other trial was over here, when we were through and Mr. Enos' office. Now, this would have been later.

Q. But you did talk about it?

A. And Tom reminded me.

Q. But you talked about it before, that you have told us, in February?

A. But like I said, there was no real definite marking on it, and his father told him to forget it, and evidently that is why it left—

Q. But he had told you about it, too, hadn't he?

A. Who?

Q. Tom. You told us Tom told you about it also?

A. He told it to me.

Q. All right, now, let me ask you this question, Mrs. Banks—

A. Like I says, he had told it to me.

Q. Prior to the time that you came here the first time and testified before Mr. Enos, you had gone over this entire matter in great detail with your lawyer, hadn't you?

120 A. Yes.

Q. Yes. And you had gone over it in great detail with your husband's brother, Lawrence Banks, hadn't you?

A. I don't know about the great detail with my husband's brother, Lawrence.

Q. Well, Lawrence came in to testify at that time, didn't he? Didn't he?

Mr. Liebenson: Yes or no.

The Witness: Yes.

Q. Mr. Braun: And you had gone over this matter with your brother, Mr. Costello, hadn't you?

A. Yes.

Q. And he came in to testify here?

A. My brother did come to testify.

Q. And you had talked about this with Mr. Whalen, hadn't you, before that trial?

A. No, I did not, sir.

Mr. Braun: I think that's all.

Mr. Liebenson: Just a few questions.

Redirect Examination by Mr. Liebenson.

January 30th was a Monday. He worked Friday.
121 He also worked Thursday. My son never told me that he saw my husband get hurt.

122 MARK A. BRAUN, Counsel for Employer-Respondent, called by claimant's counsel, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

Pursuant to a subpoena served on New Amsterdam Insurance Company, I appeared in court and produced certain statements. Claimant's Exhibit 9
123 appears to be a photocopy of one statement I did produce under court order of Judge Robson in the District Court in Chicago. I believe your copy is an accurate copy of the original. The preamble to the statement states it was taken on April 8, 1961.

This statement was not in my possession at the time of the last hearing before the Deputy Commissioner. I knew Michael Miramontez had been contacted prior to that hearing and a statement had been taken from him but it had not been transcribed as of the date of that hearing in June of 1961. I had a resume' of that statement. The resume' said that he
124 reported a rope falling but that this was completely unconfirmed and was not believable because he reported it as happening after the day's work had been completed that day.

Permission to give cross examination testimony in narrative form granted by the Deputy Commissioner.

Mr. Braun: At the time claimant's Exhibit 9, the statement was taken on April 8, a series of other

statements were also taken from men who worked at the Norris Elevator on January 30th. Not one of the other workers present could confirm that any rope had broken or any incident had occurred on that day and in the opinion of the investigators, the comment of Mr. Miramontez that a rope had broken was strictly a second thought on his part and as a matter of fact he indicated that an occurrence took place at a time after all of the men had left the job.

126 This statement was produced in the Federal District Court in Chicago in response to subpoena. We opposed the subpoena and went before Judge Robson. Mr. Liebenson represented that he was entitled to this statement on a discovery basis and further represented to the court that if any recovery were made in the Federal Court proceedings that the Longshoremen's case would be dismissed and, therefore, the court directed that the statement be produced as it could not prejudice the employer.

It further appeared that the statement was not required as this witness had been in Mr. Liebenson's office prior to the time the statement was requested.

At the time this statement was taken, a series of other statements were taken from company employees and none of these confirm any part of this statement and I would like to make all of those statements available to the Commissioner.

127 *Redirect Examination by Mr. Liebenson.*

From our information, the witness in the statement said the incident took place when no men were present on the scene. The statement in the exhibit refers to the fact that it occurred at 2:30 P.M. and

we have evidence that no one worked after 2:00 P.M. at this place.

128 Claimant's Exhibit 9 offered in evidence. Objections were raised. Claimant's Exhibit 9 received in evidence.

133 Mr. Braun: A certain statement was introduced by claimant and other statements were offered that were taken at the same time and I would like to ask whether they will be received.

Deputy Commissioner Enos: They will not be received unless the persons making the statements are brought in and made available for cross examination.

October 1, 1963.

138 DR. I. JOSHUA SPEIGEL, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

My name is I. Joshua Speigel. I am the physician duly licensed to practice medicine in the State of
139 Illinois in 1942. I am a graduate of the University of Toronto School of Medicine, 1937.

Mr. Braun: It can be agreed that Dr. Speigel is a licensed and qualified neurosurgeon and a Board member.

The Witness: I perform about 300 operations a year, 2 a working day. On February 1, 1961, I say John Banks professionally at the South Chicago Community Hospital. I examined Mr. Banks and found that he was paralyzed on the right side and in addi-
140 tion was aphasic; he could not speak; spinal puncture revealed normally clear and colorless spinal fluid was grossly bloody, indicating there was bleeding from

the brain; spinal pressure fluid was 300, that was all my examination revealed.

300 pressure spinal fluid meant the brain was swollen and also that the blood pouring out of the brain is increasing the contents of the cranial cavity.

I never got a history from this patient.

A hypothetical question propounded by Mr. Liebenson.

Q. Assume that a man 49 years of age, and height about five feet ten and a half, weight 175 pounds, was working as a grain trimmer for many years; had not been under the care of a physician for at least three years; that on January 30, 1961, was working on the edge of a barge with his back to a tower, and looking and facing into the barge; that he started to work at approximately 10:00 AM, in the morning; that at about 2:10 to 2:30 in the after-
141 noon while he was working, had a sort of a railroad worker's cap on, a one inch thick hemp rope weighing approximately 20 pounds fell from a height of approximately 50 feet, hitting him on the top of the head, and causing him to go down and forward, and grabbing onto the edge of the barge where he was standing; that he picked himself up and rubbed his head a number of times, looked like he was in pain for a period of approximately 30 minutes, and a short time thereafter left his work and went with a friend to a tavern about five blocks away, where he had two beers; that he then came home and was not intoxicated, and his friend came home with him; that he picked up his grandchild and went down into the basement where his wife was working, was there

a few minutes having a conversation with his wife and his friend, and then carried the grandchild upstairs, went into the kitchen, and his wife came up and went in, too, and then she went downstairs, and a few minutes later while the wife was in the basement the hypothetical person came to the top of a stairway which consisted of eleven stairs which had walls on each side of it going down at least four stairs, and from there on there was a bannister which went all the way down to the bottom of the stairs, which was a cement area. Assume further, Doctor, that the hypothetical man standing at the top of the
142 stairs said, "I want to talk to you," and then she walked over there, and while standing there, with his arms at his side, he suddenly fell in a forward position straight out, landing at the bottom of the stairs, and at no time during his fall did his hands or body do anything to protect itself. Assume further that this party remained in an unconscious or sleeping position, and was removed to the South Chicago Hospital where he came under the care of a physician. Assume further that this hypothetical person never fully regained consciousness from the time he was at the top of the stairs until his death some 13 or 14 days later. Assume further that a neurological surgeon was called in and examined him approximately one day later that this examination revealed—a paralysis on the right side of his body and a partially aphasic condition. Assume testing of the spinal fluid revealed that the pressure was twice the normal amount; that the pressure was approximately 300 centimeters, or listed at 300, and the spinal fluid was grossly bloody. Assume further that after this

man passed away, the Cook County Coroner's physician did an autopsy and filed a protocol in which he found an obliteration of the right nasolabial fold; incised wound one-eighth inch long over the right parietal region; an area of depression of scalp about three-eights of an inch in diameter over the right parietal region; large hematoma below scalp about
143 one and one-half inches in diameter in right parietal region extending to the calvarium; small puncture wound over left parietal region, a healed injury; massive subdural hemorrhage extending over entire left cerebral hemisphere; basal skull fracture extending from right parietal region to the cribiform plate of ethmoid bones; fracture through the posterior plate of hypophysis; that blood was found in the ventricles of the brain.

Now, Doctor, assuming all these facts, do you have an opinion based upon a reasonable degree of medical and surgical certainty as to whether or not there is a causal relation between the striking of the man's head with the 20 pounds of rope in the hypothetical question, and the fall down the stairs at his home some two hours later?

Mr. Braun: There are some objections. I think the evidence here is that he had a heavy woolen cap with earflaps. Mr. Liebenson (to the witness)

Q. Will you add that?

Mr. Braun: The evidence does not show any 20 pounds of rope nor does it show that it was a length of 50 feet. We think the evidence shows that no one saw it fall.

144-149 Commissioner: "I agree with you, they said the
145 rope was on and around him, as I recall."

146 "The weight of it is an estimate, in any event, and whether it weighed 10 pounds or whether it weighed 20 or 30 pounds, I do not think anybody can say unless you go out and weigh."

149 Deputy Commissioner Enos: We are wasting time here as far as I'm concerned. The rope fell, and it fell on Mr. Banks according to the testimony, so go ahead with your questions.

Mr. Braun: I have one further objection. That is the comment in the question that he had pain for a half hour.

150 Mr. Liebenson: (Reading from the record from the testimony of Mr. Miramontez) "I had a chance to see Johnny Banks after this for 25 or 30 minutes. He was keeping, you know, rubbing his head and then feeling his head and after that he went to work."

Deputy Commissioner Enos: (To the witness) Go ahead.

The Witness, Dr. Speigel: I have an opinion.

It is my opinion that the blow that the hypothet ical patient received from this mass of coiled rope caused him to lose consciousness just before he fell from the top of the steps.

Q. Some two hours later, is that correct?

151 A. Some two hours later.

Q. Will you give us the reasons for the opinion?

A. He was, apparently, perfectly normal up until the time he was injured. He had 2 beers, which apparently did not make him intoxicated. He came to the foot of the steps and suddenly fell. It was clear from your description of the fall he had to be unconscious when he fell. The reason for that is he

wasn't protecting himself as an ordinary fall, he would have certainly made some attempt to do so. The second reason, he was standing. He wasn't moving. One cannot slip or trip unless he moves. From your story, he was going to deliver a verbal message to his wife from the top of the steps, otherwise he would have started down. That is all.

The cause for his passing out at the top of the steps would be either epilepsy which he apparently did not have or was not reported or acute subdural hematoma. An acute subdural hematoma is bleeding from one of the large venous sinuses or veins outside of the brain underneath the dura, but not
152 into the brain. It is one of the deadly lesions as opposed to chronic subdural hematoma, which is slight bleeding, and then an enlargement of the hematoma by an osmotic process. This is not a deadly lesion if taken in time.

In this area of the skull the vessels are of various sizes. The period of 2 hours is of significance. This caused the lucid or latent interval, the size of the hematoma. In other words, the brain has a certain degree of compensatory power and in spite of the fact that—that is between the brain and the dura —this deal is going on, the patient proceeds normally until his compensatory powers are past, and suddenly, like the first drop flowing over the dam, they become unconscious or paralyzed, or both. It was a classical case of subdural hematoma.

153 The type of blow, severity has no significance to a subdural hematoma, an acute subdural hematoma.

154 *Cross Examination by Mr. Braun.*

I saw Mr. Banks in the South Chicago Community Hospital on the 1st of February and on the 5th of May. No, no, I only saw him once. Actually, it was on the 3rd of February and prior to that time, he had been seen by my associate, Dr. Tinsley. When
155 I saw him, the significant findings were three; elevated blood pressure and the gross of blood in the canal, hemiplegia and aphasia. Of the list of things in the hypothetical question that were found by the Coroner, it is correct that the first, the obliteration of the right nasolabial fold, is of no significance.
156 The finding of a one-eighth inch long wound over the right parietal area is consistent with the fall down the stairs and it is exterior.

The area of depression of the scalp, three-eighths inch in diameter is also consistent with a man falling
157 down the stairway and the large hematoma, one and one-half inches in diameter in the right parietal region is consistent with the injury of falling down the stairs.

The small puncture wound in the left parietal region was a healed wound and I had no opinion regarding it.

The massive subdural hemorrhage extending over the entire left cerebral hemisphere could result from the fall down the stairs and the basal skull fracture would also result from the fall down the stairs. The
158 fracture through the posterior plate is consistent with the fall down the stairs.

With that type of trauma, you could obtain intra cranial injury that would result in blood going into the ventricles.

Q. So that all of the findings could have resulted from the trauma to the head on the concrete floor.

A. That is a correct statement.

It is a good question as to what caused the death, whether it was one of these or a combination of these. In trauma in particular, hemorrhage is a frequent cause of death, but it causes death, in general, more rapidly than this man's death eventuated in; he lived for 14 days following whichever trauma you are incriminating.

159 Acute subdural hematoma would be the more likely cause of death. In the classic subdural hematoma, death would result in 4 to 5 days. Generally, that is true. The fact that Mr. Banks lived for 14 days could not indicate that his subdural was not acute but chronic. The chronic subdural, the fluid is much lighter than this blood clot he described; a straight subdural hematoma. The acute, the term "acute" is descriptive, particularly of the latent interval, the lucid interval, the interval between whatever injury caused it and the development of coma. That is what gives the criterion to the term "chronic" or "acute".

160 In the acute situation, it is possible that the man would be unconscious from the moment of the trauma. In the acute, the injury has to be quite direct and may be frequently sufficiently severe to cause the patient to be unconscious, to separate items. When you have an acute you have frequently an immediate unconsciousness. In the chronic subdural, you frequently find no symptoms at all for periods of two to three weeks. That would be a classic picture of the chronic subdural.

I recall testifying in a case in the Federal Court involving the death of John Banks. I answered a
161 hypothetical question in that case almost identical to the one given to me today, including a history of a rope falling on him. I was cross examined by an attorney named Griffin.

Q. Do you recall this question, Doctor Speigel?

"Question: So you would say that he did not have an acute subdural episode?"

"Answer: No, he didn't."

A. May I read the context of this?

Q. We are asking at this point whether you recall that question being given to you, and you making that answer?

A. I don't recall it, but if you allow me to refresh my memory—yes.

Q. That was given to you and you gave that answer?

A. That is correct, Mr. Braun.

Q. And subsequently this question was asked:

"Question: You are saying that the kind of
162 subdural hematoma that he had was a chronic one?"

"Answer: He eventually died from that, yes."

A. That is correct. It says so here.

Q. So at that time you testified it was chronic, and now it is your opinion that it was acute, is that right?

A. Yes.

The Witness: In the acute situation, the man may become unconscious almost immediately. It is quite common and in the chronic subdural symptoms, what-

ever they may be, take weeks or usually take many weeks, sometimes days, but mostly weeks.

I recall testifying before Commissioner Enos some two years ago in June of 1961 with reference to the death of John Banks. At that time, I answered a
163 hypothetical question with reference to this patient indicating that I felt his fall down the steps was related to an incident of January 26.

It is correct that my partner on first seeing Mr. Banks in the hospital, the South Chicago Community Hospital, on January 30, 1961 made a diagnosis of his condition being due to alcoholism with a cerebral vascular accident.

When a cerebral vascular accident occurs, it will cause sudden unconsciousness. In a CVA you have sudden bleeding in the brain and this will cause blood
164 to be in the ventricles. I saw Mr. Banks 3 or 4 days later, about February 4, and made a comment in the same record that there was a history of cranial cerebral injury. Three days prior to the "cerebral vascular accident".

165 I have stated that a number of things may cause a man to become suddenly unconscious. One is epilepsy. Cerebral Vascular Accident is another. There could be a host of things. I don't think lack of nourishment or fatigue could cause a man to be suddenly unconsciousness. He might gradually lapse into a coma. This fella just had two bottles of beer. That would keep a man going. People do faint from lack of nourishment.

167 Q. Were you aware that the treating physician in this particular case at the hospital—at least you and your partner, your office, in consultation, made a final

diagnosis after death in the hospital record of cerebral vascular accident, and the record was signed and closed in that manner?

A. Well, he has the same right to error as has my partner.

The Witness: In giving the answer to the hypothetical question today, it was important and significant that the question stated the weight of the rope that struck the skull was 20 pounds. If a wisp of wrapping string hit him on the head, it would be another, particularly with the woolen cap he was wearing, but 20 pounds, if it's coiled up as the hypothetical said, and fell 50 feet, accelerating, and I have forgotten my physics, but accelerating considerably over the fall, then it would be a substantial knock.

168 It would be fair to say that if that fact were not in the hypothetical, and the weight and amount were substantially reduced, my answer might indeed be different. It was also important in my opinion that the man stiffened before he fell and did not attempt to protect himself. In my testimony I made refer-

169 ence to the mechanics of body motion—that a body in motion tends to stay in motion. I would say that if a man is able to fall to the foot of the steps without touching the steps, he would have to run at all

170 his speed like a broad jumper and not land on his head. If he were conscious; not land on his head, but on his feet. I was just picturing it. Am I understanding you correctly that man is in motion, the motion does cease, and he falls to the foot of the steps and lands on his head? I do not think any-

171 body conscious would ever do that. If he ever did it, he would have to take a running jump.

Q. I am asking you with a man, say unconscious, he would have to be in motion to do this, would he not, to fall all the way down?

A. No.

The Witness: If he falls down, gravity may or may not take him. If the physics are such, the body falls and the body catches on one of the steps, he may not fall further, but under normal circumstances an unconscious person lying supine or prone in the axis of the steps will fall down onto the steps and onto the floor. He would fall onto the steps immediately below him.

It is also true when a person becomes suddenly unconscious they frequently slump to the floor and I agree that a body at rest would tend to stay at rest.

172 Q. So, if it was at rest and it became unconscious, it would slump to the floor.

A. That is right. If the axis of the floor were in any way directed towards the steps. The moment the axis of the fall directs the falling body toward the step, we now have reached a point where the body is overbalancing into the downward force of gravity.

Q. Onto the steps immediately below?

A. Yes.

In the acute subdural hematoma there would be fairly rapid bleeding into the subdural space. That would be a rapid accumulation of pressure, and you would not have the osmosis process we previously talked about. It is too fast.

173 When you have the sudden accumulation of blood in the subdural space, this could cause headache immediately. It would not necessarily cause a loss of coordination or reflex change. It might cause imme-

diate unconsciousness. It is quite consistent but not mandatory with the occurrence of an acute subdural hematoma. It is acceptable.

Redirect Examination by Mr. Liebenson.

174 I was asked about my partner's diagnosis about alcoholism in the record. I thought alcohol had nothing to do with it. My partner said that the diagnosis was alcoholism and cerebral vascular accident. He had neither CVA nor did he show evidence of alcoholism. That will be shown in the Protocol. They sliced the brain all the way down. There was no cerebral vascular accident. Evidence of alcoholism would show in the liver.

175 I have no knowledge as to whether this man was hurt personally on the 26th or he was hurt on the 30th. My answers were based on the facts in the hypothetical question. That's all I can base them on.

Q. Now counsel asked you about this record, where you said something about the death of the individual was caused by a chronic subdural hematoma. I show you Page 86, and ask you whether or not you testified that the occurrence here was an acute subdural hematoma, but that the death was caused by a chronic—

A. That is correct.

The Witness: I never received a history of eli-
176 lepsy here. Immediate unconsciousness is not the necessary element of an acute subdural hematoma.

177 *Recross Examination by Mr. Braun.*

178 I was not given any findings with a reference to the autopsy of this man. I do not know whether there was any finding on examination of his heart,

whether he had an occlusion or he did not have one and I never got a personal history from anybody in this case. My partner took that history from the
179 family. I don't know precisely what was told to my partner. He normally makes an accurate notation on what is told him.

180 In the classic acute subdural hematoma, you could have immediate unconsciousness.

Deputy Commissioner Enos: Just a minute, Doc-
181 tor. I want to clarify something here on that hypothetical question that Mr. Liebenson asked you. I would like to change those facts a little bit, and ask you to make the hypothetical question instead of a coil of rope coming down and striking this man on the head, if it was a single strand of one inch rope falling a distance of say 50 feet, and striking him on the head, would that change your opinion in the case?

The Witness: I wouldn't have the right to answer that question because I have never seen a rope fall straight down and fall as if there was a tail at the end of it, heavy part at the bottom.

Deputy Commissioner Enos: I think you would have to do like any of us would have to do, visualize that.

182 The Witness: The visualizing is as follows: The rope has to coil when it falls. It cannot fall as a single, sinuous item.

Deputy Commissioner Enos: It will coil to some extent. There is no question about that. Anyone who is acquainted with ropes knows that will happen, but what I am trying to inquire of you, I am trying to get your opinion that if this rope fell down and

just, say, a single strand of it hit him on the head, would that change—

The Witness: The single strand couldn't do a thing to him, but as soon as the deceleration occurs on the bottom, this hypothetical single strand, it will almost accumulate down quickly.

Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I
183 would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps, and no part of his body touched those steps as he went down.

A. I do not see how that is possible, unless as I told Mr. Braun, he took a running start. To clear the steps would be—if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell

he has to fall on the steps. Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

184 Q. You could not explain that from a medical standpoint, how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.

Q. What would be the natural reaction?

A. Just a fall—

Q. Would he have a tendency to slump?

A. He could slump.

Q. And tumble down the stairs?

A. Yes, he could.

Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?

A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, but he would have to hit the steps.

185 Claimant has rested.

MR. JAMES HILLARY WHALEN, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

My name is Hillary Whalen. I work part time as a grain trimmer and I have done this work for a number of years. I had known John Banks for 10 or 12 years and I worked with him on January 30, 1961. I worked on the same job with him at Norris
187 Elevator, 98th and River in Chicago. We started about 10:00 AM that morning. We worked unloading the same barge that day. There was just one barge being unloaded there that day. We finished our work at about 2:30 or quarter to three in the afternoon. During the time we worked that day, I did not see
188 anything unusual happen to John Banks. He made no complaint to me during that day and I left the premises with him at about 2:30 or 3:00 PM. We walked over to my car and Mr. Banks rode with me. We stopped at 103rd and Avenue M at a tavern. We
189 had a few drinks and then I had to go home. Both Mr. Banks and I drank beer. I don't remember how many we had.

Q. Can you give us an estimate. Was it more than 5?

A. No, I don't think it was more than 5; between 2 and 3 and 4 because we wasn't in there that long.

The Witness: I went into his home with him after
190 that and we visited with his wife. We went to the basement to see "Ag". While there, we had another can of beer. We didn't drink it all. We just opened it up. I was there about 20 minutes—20-25 minutes. During the time that I was with John Banks after

we left Norris Grain Elevator that day, he did not make any complaint about feeling bad in any way. He made no complaint about feeling bad or anything to me. He made no comment to me about being injured that day and he made no comment to me about
191 being struck by anything.

Cross Examination by Mr. Liebenson.

When I worked at Norris on the 30th, I worked at the bottom of the barge. John Banks was not my tripper and if anything happened to John Banks and his rope, that would not affect mine. I would still be working. My job is to work in the bottom to bring the grain in. About the question, it could not have been that we had only 2 beers that day. We had more than 2. I bought one. He bought one. The
192 house bought one. In April, 1961, somebody came out from New Amsterdam and took a statement from me. My mind would be fresher back in '61. In that statement, I said we stopped for a couple of beers and the kid drove us home. It was about 4:00 o'clock
193 when I left Mr. Banks. It was a little before 4:00 and he was not intoxicated.

Redirect Examination by Mr. Braun.

When I say a couple, I do not always mean 2—just a few. When I am working down in a barge and one of the shovels breaks down for any reason, we
194 are frequently aware of it. Yes. If you are down for a half hour, you'd know that. I do not remember one shovel being down that afternoon.

Recross Examination by Mr. Liebenson.

I didn't say a shovel was down for a half hour because you very seldom see a shovel down for a
195 half hour. You know when another shovel is down. You can tell sometimes if its on the same side as you but you don't pay no attention. John Banks was not on my shovel that day. I don't pay attention or have any knowledge whatsoever as to what took place on John's shovel. If one of the other shovels stops working, you could tell but you don't pay no attention to it.

196 Deputy Commissioner Enos: Q. You do not know whether a rope broke on the other shovel, the shovel Mr. Banks was working on, or not, do you?

A. No, sir, I don't.

197 *Afternoon Session.*

DR. ERIC OLDBERG, Witness for carrier, Testified:

Direct Examination by Mr. Braun.

My name is Eric Oldberg. I am a physician and surgeon.

Mr. Liebenson: I will stipulate for the record as to the doctor's qualifications as a specialist in neurosurgery.

Mr. Braun: Dr. Oldberg, I will ask you to assume that on January 30, 1961, the hypothetical individual was 49 years of age; that his height was about five feet ten and one-half inches; that he weighed 175 pounds; that on that date he was working as a grain trimmer, which had been his occupation for many

years prior thereto; that in the morning he had
198 worked as a grain trimmer, and that at 2:00 or 2:30 in the afternoon while working as a grain trimmer, a rope that was stretched above him parted, and that a portion of this rope fell and was seen thereafter to be about his head and some about his shoulders; that at the time of this incident he was wearing a heavy, woolen cap with ear flaps; that the rope in question was one inch thick, and a co-worker estimated that it might have weighed 20 pounds in total; that after the rope fell, he was seen to have leaned forward against a hatch cover which was approximately chest high to him, and that he leaned forward on this with both hands, and that thereafter, he rubbed his head and stated that it hurt; that 30 minutes thereafter he resumed work, the 30 minute delay being due to the repair of the rope, and that he continued to work for approximately an hour, when the job was completed for that day; that he then left the site of his employment with a co-employee, and went to a local tavern, and that he had what was termed as a couple of beers, which could have been two, three or four; that he was then driven to his home where another can of beer was opened for himself and for his friend, and that he carried his grandchild into the basement, spoke with his wife, carried the grandchild back upstairs, and shortly thereafter, at about 4:15 PM, or slightly later, he was heard to call from the head of the basement stairs to his wife, "I want to talk with you," and immediately thereafter his wife testified that she saw his arms suddenly stiffen at his side, and he pitched forward down the stairs without touching the stair-

way, striking his head on the concrete floor; that he remained unconscious after this fall, was removed to the South Chicago Community Hospital, and that day he was seen by the family physician and also by a neurosurgeon, and it was determined that his spinal fluid was bloody and that the spinal fluid pressure was 300 millimeters; that he had a right hemiplegia and partly asphasic; that he remained in the hospital from the 30th day of January until February 12th, the day that he died; that he never regained full consciousness; that a coroner's physician performed an autopsy and it was found and reported by the coroner that he had an obliteration of the right nasolabial fold, an incised wound one-eighth inches long over the right parietal region, an area of depression of scalp about three-eighths of an inch diameter over the right parietal region; that he had a large hematoma below scalp about one and one-half inches in diameter in right parietal region extending to the calvarium, a small puncture wound over left parietal region, healed injury, and massive subdural hemorrhage extending over entire left cerebral hemisphere, a basal skull fracture extending from right parietal
200 region to the plate of ethmoid bones, and there was blood in the ventricles of the brain.

Now Doctor, assuming the facts in this hypothetical to be true do you have an opinion based upon a reasonable degree of medical certainty in your experience, as to whether or not there was a relationship between this rope falling incident described in the hypothetical question and the fall down the stairs?

200-202 Objections raised to stated weight with reference to the rope.

The Deputy Commissioner: The off the record discussion was with reference to the weight and length of the rope which broke and fell and the hypothetical question has been amended to include—

Mr. Braun: We are asking to amend the hypothetical question. I will ask the Doctor to assume that the rope in question stretched from a point in a barge that was directly in front of the hypothetical individual, and that it stretched at an angle from that point to a point approximately 50 feet above
203 the dock on which the hypothetical man was standing; that the rope was heard to part, and co-workers said they felt it parted near the top, and estimated that the weight was approximately 20 to 30 pounds.

Objection that hypothetical did not include that the entire 50 feet of rope was on top of his head.

204 Deputy Commissioner Enos: It would be impossible for a falling rope to coil in a tight ball.

205 Objection to his prior physical health.

Mr. Braun: Yes, the only thing in this record being he had complained of headaches on one occasion the preceding weekend, and he did not ask for his lunch to be packed. That is the only evidence in this record of improper health. The man, according to the testimony, had not had medical care for some three years prior to this occasion.

206 Deputy Commissioner Enos: In view of the discussion regarding the rope, I would say that the hypothetical question should state that the falling rope, approximately 50 feet of it, fell and struck the hypothetical man on the head and shoulders. No one is in a position to say how much struck the head—how much struck the shoulders.

208 Mr. Braun: Let us amend and say forward and down to the extent that his hands came to rest on the hatch cover that was approximately chest height.

209 Hypothetical question amended to state that the person drinking with him stated that he was not intoxicated.

Mr. Braun: Doctor, would you consider that the hypothetical question with the amendments you have heard? Do you have an opinion as to whether or not the incident described caused this man to pitch down the stairs some two to two and one-half hours later?

210 The Witness: I do.

My opinion is that I see no connection.

Q. Will you describe the reasons for your opinion, Doctor.

A. Yes. They have described to me a probably healthy man, apparently, who was working, and who was struck by a rope which detached itself from 50 feet above his head, might have weighed 20, 30 pounds, then collapsed down about his head and shoulders, which has sufficient weight so that he apparently went forward somewhat, and caught himself on top of the hatch cover, and who rubbed his head for a considerable period of time, and evidently was not unconscious, and when the rope had been repaired, which took close to half an hour, he and his colleague went to work again and worked for about an hour. He then apparently—there is nothing given to me saying he had any particular complaints when he returned to work, and he had a beer or two or three, whichever it was, in the tavern on the way home, and another can of beer when he got home, and behaved normally, and in fact invited his friend into the house for a can of beer. He then carried his

grandchild down to the basement, and carried her
211 back upstairs again, and then shortly thereafter, maybe a couple of hours after the original fall of this rope, and while standing at the top of the stairs he called to his wife, and she saw him just in time to see him stiffen up a little bit and pitch forward down the basement steps. Now, there is no way that I can correct anything that could have happened two hours before that would give a latent period of complete well being except for the rubbing of the top of the head, the scalp, which is the only part of the head which has any sensation, and then all of the subsequent events, and then a sudden catastrophic thing that precipitated this man down a flight of stairs. I cannot connect the two by anything that I know of as far as the mechanism of the brain is concerned. If brain damage had been the result, or anything around the brain had been the result of this rope falling, then I would expect a march of events that might have ended in unconsciousness or something of that sort, but I cannot speak nor can I explain on any reasonable grounds why for a couple of hours everything was fine, and all of a sudden, almost instantaneously, the man evidently loses consciousness or trips, whatever happened to him, and down he goes down a flight of steps to the concrete basement floor. That just does not happen, in my experience anyway; no connection between the two
212 from a medical standpoint. It could happen with other things, heart attacks, anything else that might send a man down the stairs, but I cannot connect it with the rope collapsing on the man's head.

213 I have considered the findings of the coroner. In my opinion, all of those findings are ascribable to

the fall down the steps on the concrete, which resulted in death in two weeks. This includes the scalp injuries, the hematoma under the scalp, one penetrating wound an eighth of an inch long, and another one was supposed to be healed, a fracture on the base of the skull, a massive subdural hematoma, all of which are attributable to what happened to the man when he fell down the stairs. The massive subdural hematoma is consistent with the trauma at the basement floor. The finding of increased spinal pressure, the blood in the spinal fluid, aphasia, hemiplegia are all consistent with the fall on the floor.

214 *Cross Examination by Mr. Liebenson.*

The Witness: Medicine is a science but it is not mathematically exact. Considering all the findings of the pathologist, I would think there was damage to
215 the whole brain and the findings described with reference to the right side could be caused by the fall with the head striking the cement floor.

216 With reference to the small puncture wound over the left parietal region, healed injury and a massive subdural hematoma extending over the entire left
217 cerebral hemisphere, I am answering on an entirely academic basis as to whether they might or could come from another blow. In the first place, the external wound was healed and, therefore, it probably came from some previous episode of some kind. As far as the subdural hematoma is concerned, again, this is strictly academic, of course, it is possible for a man with a chronic subdural hematoma to fall down and fracture his skull on the other side of his head,

and the previous—some previous injury might have produced a chronic subdural hematoma, so that, from an academic standpoint, of course, it is possible, just as it is possible for me to have a coronary disease
218 and break my leg. With reference to his falling down the stairs, although I did not see him and this is only hearsay, if he did nothing to protect himself, I think he was more likely to be unconscious than conscious. At least people throw out their arms to protect themselves, but I didn't see him fall, of course.
219 The skull has things that are called diploe. They are spaces which contain blood, and there is always an arterial circulation in the skull. All through the body are vessels of various sizes, including the head. It is not true that an intermediate blow causes bleeding
220 in the skull rather than a very severe one. In general you would simply say that a more severe blow to any part of the body, the more severe the damage could be done. I mean that's academic.

A hematoma is a collection of blood. It means tumor
221 of the blood, is what it actually means. A hematoma inside the skull pressing the brain can cause unconsciousness.

Redirect Examination by Mr. Braun.

I have an opinion based upon the hypothetical situation here, including the rope incident and all the other activity of this man in the hypothetical as to whether there is any evidence of a trauma such as to cause a massive subdural hematoma. My opinion
222 is that the subdural hematoma described in the autopsy, the protocol of this man, had nothing to do with the rope falling on his head. I think it was entirely the result of the fall down the stairs.

223 The trauma to the right side of the head entirely and the subdural hematoma are all entirely consistent with having fallen down the stairs. Chronic subdural hematoma, especially a massive one, takes time to develop. This man had two weeks for that to develop after he fell down the stairs, and finally died. In my opinion, the trauma down the stairs did produce the massive subdural hematoma. At the time counsel showed me a portion of a previous transcript, I was discussing the formation of a chronic subdural hematoma, how they form. That statement that was read does not in any way contradict the opinion I have just given.

224 MR. ROBERT R. OLSTER, Witness for the carrier, Testified:

Direct Examination by Mr. Braun.

My name is Robert Olster. I live in Burnham, Illinois and am employed by the Falstaff Brewing Corporation. I also work part time as a grain trimmer. I do this work for the Chicago Grain Trimmers Association and have done it for about 15 years. In the course of doing that work I knew John Banks.
225 I worked with John Banks on the last day he worked, January 30, 1961 at Norris Grain Elevator in Chicago.

We started working at 10:00 AM and I was pulling rope. That means that after the shovel stopped, I pulled it out of the tower or the house to create slack. John Banks was tripping in the rope that I was pulling. During the day of January 30, I did
226 not see a rope fall and hit John Banks at any time and I do not recall having a broken rope that day. I do not recall that that shovel was stopped or down

for a half an hour on that day but I know there has been times when they had a little trouble with that shovel. The trouble was not due to a breaking rope.

During the time I worked with John Banks on the 30th, he made no complaints to me about being struck by a rope or about feeling ill.

Cross Examination by Mr. Liebenson.

227 It was well after the death of John Banks before I was contacted regarding any occurrence of January 30, 1961. I don't remember who contacted me but I made a statement to him. I was contacted by a man that had a stenographer with him and I'd say it was within a short time after John died. I
228 remember the day I worked with him. I don't remember if it was the last day in January or the 25th but I know the last day that I worked with him at the elevator. I don't know when it was that I worked with him prior to January 30. I didn't work too much with him because usually at that time of the year the river is slow and me just being a part time worker and if they didn't have one job I never worked because the regulars worked and John was always number one man on the river and he was on that job all the time. I recall that day I worked with John.

229 In the Fall of the year when the grain was really running, I worked not too often with him. He was top man on the river and he was on the job all the time and if there was a long job, naturally he was on there and me being a part time worker, I wouldn't be on that job. On that date pulling rope was to

my knowledge Ed Wagner and Miramontez was there and McAndrews.

During the day, some of the fellas go into the warming house. The shovelers do because they shovel one hatch and rest the other hatch but the rope pullers don't. They pull the rope every hatch unless you might happen to have two of the shovelers in the hole shoveling on the same shovel, and you'd work it three ways. I don't remember whether I
230 went into the warming house that day. I might have.

Mr. Braun: Objection.

Objection overruled.

The Witness: I don't remember if it snowed that day and I don't remember the temperature but I remember that we quit between 2:30 and 3:00. I did not get that from Mr. Braun.

231 Q. Isn't that a little earlier hour than you usually work?

The Witness: For a part time worker, you might go out there and work 2 hours and you are guaranteed, or you might go out and work four or five, five and a half hours, or nine, ten or twelve hours.

The only record that I know of that I worked that day would be Mr. Grennan. He has the time slips.

I remember that day I quit at 2:30 PM. It was at a little earlier hour than usual. I was a part
232 time worker. I worked regular at Fallstaff, and I was working steady four to twelve then and when I got called like that, I would ask Huey about how long it would be. I'd take extra close and I would change into clean close at the elevator and then go to work and stop for a sandwich or so if it was before my starting time on my regular job.

On that day, the only thing I could say is that in between hatches while they are shifting or dipping the barges, we would go into the warming houses and warm up and when they were ready to go to work, somebody would holler and we'd go out and start. On that day I can't recall any specific time
233 that I went into the warming house. I couldn't say that I did get a spell because I don't remember if I did or not.

Redirect Examination by Mr. Braun.

The Witness: When they are shifting hatches, both the puller and the tripper are free to go into the warming house. When they are shifting hatches, neither the tripper nor the puller are doing their job. They are doing nothing. The man that was running the job would be John Banks.

234 In answer to the Commissioner's question the witness stated:

Yes sir, that no rope broke that day and he was the puller for John Banks. He was working in close
235 connection with him. I was there during the entire work that was accomplished that particular day and I do not remember whether a rope broke or not.

Witness excused.

HUEY GRENNAN, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

236 My name is Hugh J. Grennan. I'm employed by the Chicago Grain Trimmers Association and was so employed on January 30, 1961. I am what they call

the dispatcher. I dispatch the men out to work. In the office, I keep track of the time. I get the information from the superintendent of the grain elevator or of the grain company itself and I did make a record of the time worked by the grain trimmers on January 30, 1961.

237 As a part of my duty, I assign the trimmers to various locations at which they are to work. On the morning of January 30, 1961, I assigned John Banks to the Calumet Elevator. That assignment lasted approximately a half an hour. After that, I assigned him to Norris Grain Elevator to start at 10:00 AM. Other men were assigned to Norris as the first place they worked that day. The other men

238 that were assigned to start at Norris at 10:00 AM were Miramontez, Thomas Banks, James Whalen, Jr., James Whalen, Sr., Augustine Artega, Robert Olster, Victor Markowski, Edward Koziera and a man by the name of Munguia. This Robert Olster was the man I just saw leaving here.

The crew at Norris, according to our records, worked from 10:00 o'clock in the morning to 2:00. I keep the time and my record shows from 10:00 AM to 2:45 PM. I got the information from the man who handled the job who was John Banks.

239 It is correct that in turning in the time it is rounded off to the nearest quarter hour so that they stopped working sometime between 2:30 and 2:45. There were other men that finished there that day at Norris. The names I gave were simply those that were called out at 10:00 AM.

Cross Examination by Mr. Liebenson.

The Witness: I did not see John Banks on the 30th of January. I did talk to John on the phone. He reported into his office. The information with
240 respect to the time came from Mr. Banks.

Witness excused.

JOHN GOETZINGER, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

On January 30, 1961, I was employed with the Norris Grain Company at the elevator at 98th Street. That would be 98th and Calumet River. My position
241 was that of an electrician. I worked round or about the marine leg in the tower when that piece of equipment was being used to unload a barge.

There were no records kept by Norris Grain as to the activity of the marine leg or the barge. There were no records kept to my knowledge as to the time or day when a rope would be changed on the marine leg. No records were kept as to whether or not a
242 particular shovel might have been incapacitated or not operating for a certain length of time on a certain day. There were no records to confirm or deny whether a rope broke on January 30.

Cross Examination by Mr. Liebenson.

I wouldn't want to say it was a common occurrence that ropes would break. I don't know or remember any one particular day of ropes breaking. If you got it recorded there, I must have said it was a common occurrence as far as ropes breaking.

244 Deputy Commissioner Enos: What he said was, as far as I can recall, ropes break. He wouldn't say it was a common occurrence, and there he said it was a common occurrence, so it is a question of what is a common occurrence. The fact of the matter is that he testified ropes break.

MARTIN LYDON, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

My name is Martin Lydon. I live at 3010 West 55th Street, Chicago. My occupation has been that of a
245 grain trimmer since 1926.

In January, 1961, I worker as a grain trimmer and I knew John Banks. I remember the last time I work-
246 ed with John Banks. We worked at 98th Street, Norris Grain Elevator. That was the last day Johnny worked and it was in the month of January, 1961. My job was tripping.

That day, John Banks was at Calumet in the morn-
247 ing and they came over to 98th Street at noon time. John Banks was tripping in, the same thing I was doing. I worked probably 10 to 15 feet away from John Banks.

I did not see a rope fall out of the tower and hit John Banks and I do not remember his shovel being down for a half an hour that day. It is my best judgment that it was not down. John Banks did not complain to me at any time that day about feeling bad. He continued to work until the barge was empty. I did not see a rope break from the tower at any time that day.

Cross Examination by Mr. Liebenson.

The Witness: I do not remember the number of the barge. I worked on the side of the barge near the dock. When I work as a tripper, it is my job to look down into the barge and it is not my job to look at or worry about the shovels of other trippers.

At Norris they had hemp ropes and they do break every once in a while. I do not remember any rope breaking. When working, you've got to watch your own shovel. You can't watch the other man's. You can only look at one shovel.

Redirect Examination by Mr. Braun.

If any of the shovels stopped for a half an hour, I would not know it. Oh, yes, sure I would.

Recross Examination by Mr. Liebenson.

Oh, yes, I would remember if a shovel stopped for a half an hour. I didn't see no shovel stop.

The first time I was contacted about this was this year, 1963. That's when I got this (indicating). I think you sent this out (referring to claimant's counsel) but I didn't get it because I wasn't home that day. I do not remember whether any rope broke on the 27th or the 29th. I do not remember of any rope broken on the 26th, on the 24th or the 19th. Yes, I remember January 30, 1961. I didn't see no rope breaking. I do not remember what day of the week it was. I don't remember what the temperature was. I did see a rope break in 1944 and I remember it. I do not remember these other days. I don't remember whether it snowed that day. I was only in the warming house at noon on that day.

At noon time we were in there and before we went to work. You see, the man shoveling in the hole, there are two on each shovel and they can't go in but the is tripping, he can if he wants. He got to be there all the time. Nobody to relieve him.

255 I remember the last time I worked with John Banks without reference to what day of the month it was. I remember it good because the two of us walked up from the barge to the office. It was at Norris, 98th Street and John Banks went that way and I come this way because I live this way. I don't know what happened after that. I never saw him 256 after that. I didn't see no rope breaking. I am telling you the truth. I am telling you what I seen and that's all I can do. I would have known if a rope had broken there that day. I am quite sur of that.

Witness excused.

Mr. Braun: I have one request Mr. Enos. This morning during the questioning of Dr. Spiegel I asked him a question regarding his comment in the Federal Court and then Mr. Liebenson read something to him from Page 86 of the Federal Court transcript. To make sure that the record is correct 257 in that regard, I would ask whether we can agree at this time as to what actually appears on that page. May that be read?

Deputy Commissioner Enos: Go ahead.

Mr. Braun: Question by Mr. Griffin, and this is about the last third of the page:

"Question: Doctor, an acute subdural hematoma takes approximately how long to develop?

"Answer: Well, it is a proper question except that everything varies in degree.

"Question: Let me ask it this way: If death is due to an acute subdural hematoma, about how long goes (sic) does it take death to come after the hematoma?

"Answer: In General?

"Question: Yes. This is an acute one.

258 "Answer: Oh, I would say about—this is only on the basis of my past experience rather than any specific case—about five days."

262 Hearing in the above matter was closed by Deputy Commissioner.

263 Certification of transcript by Charles Hines, Court Reporter.

Exhibits introduced during the hearing include carrier's Exhibit A, a petition filed by attorneys for Chicago Grain Trimmers Association and New Amsterdam Casualty Company setting forth the suit filed by Agnes Banks against Norris Grain Company in the United States District Court for the Northern District of Illinois seeking damages of $100,000; 2) That the suit alleged a negligent act by Norris Grain Company and it resulted in a verdict of $30,000 on May 3, 1963 and that a motion was subsequently filed by Norris Grain Company for a directed verdict and new trial; 3) On May 9, 1963, a new trial was ordered unless a settlement of $19,000 was accepted; 4) The $19,000 payment was agreed to with out the consent of the employer or its insurance carrier; 5) That on February 21, 1964, the court ordered the Ad damnum be limited to $30,000 but this was opposed by Agnes Banks and her attorney; 6)That the court's offer of a new trial made available to Agnes Banks the opportunity to seek an

unlimited Ad damnum and that the acceptance of the $19,000 constituted actual prejudice to the employer; 7) That in addition to the actual prejudice, Chicago Grain Trimmers Association was presumed to be prejudice.

The prayer of the motion was that the claim before the Deputy Commissioner be dismissed. Exhibits attached to that petition included a certified copy of the action brought by Agnes Banks as Administratrix against the Norris Grain Company and certified copies of the orders of the Federal District Court in that action.

The May 9, 1963 order provided "arguments heard on motion of respondents for directed verdict made at close of libelant's case denied. Motion of respondents to set aside verdict and judgment entered thereon and to have judgment entered in accordance with respondents motion for directed verdict denied. The motion of the respondents for new trial will stand granted unless the libelant, within 10 days from this date, enters in the record a remittitur in the sum of $11,000."

Order dated May 16, 1963 reads: "Libelant accepts $11,000 remittitur. Enter judgment for libelant for $19,000 and costs."

Claimant's Exhibit 1—Answer to employer's petition to bar claim.

1) The answer admitted employer's allegations of Paragraph 1.
2) Admitted Allegations of Paragraph 2.
3) Alleged that the court entered a remittitur of $11,000.

4) Claimant agrees that she accepted the remittitur of $11,000 as ordered by the court.
5) Admitted allegations of Paragraph 5 of employer's motion.
6) Denied that new trial would give claimant unlimited Ad damnum and further alleged that if claimant did not accept remittitur of $11,000, she would be prejudice.
7) Denied employer was prejudice on May 16th order.

Claimant's Exhibit 2—Death certificate of John Banks.

Claimant's Exhibit 3—Autopsy Protocol setting forth nine findings on Coroner's examination.

Claimant's Exhibits 4, 5, 6, 7 & 8—Photographs of Norris Grain Company elevators.

Claimant's Exhibit 9—Court reporter's statement of Michael Miramontez.

TRANSCRIPT OF PROCEEDINGS
CASE NO. 46-71

U. S. Department of Labor,
Bureau of Employee's Compensation

(Testimony started May 18, 1961)

2 The Commissioner recited that the claim was filed by Agnes M. Banks on February 20, 1961 and that administrative reports revealed that on January 26, 1961, John J. Banks was employed by Chicago Grain Trimmers Association, Inc.

3 It is alleged that on January 26, 1961, the decedent was injured while engaged in his employment; that injury occurred on the afternoon of said day and that

on the afternoon or evening of January 30, 1961, the decedent fell down the basement stairs while at home and sustained injuries which were the immediate cause of death on February 12, 1961.

The Commissioner recited that the sole issue was whether the fall which caused the death was a consequence of an injury which arose out of and in the course of employment.

AGNES M. BANKS testified in behalf of the Claimant as follows:

Direct Examination by Mr. Moses.

My name is Agnes Banks. I live at 3520 East 112th Street, Chicago 17, Illinois. I was the wife of John Banks.

On Thursday, the 26th, I talked to my husband when he came home from work. I was sick at the time but I got out of bed and we had coffee. He hollered to me and said, "Well, your brother isn't the only casualty on the river" and he said, "I got hit with a cable today". He asked me to look at his head and I said I couldn't see anything but he said, "it feels light". I looked at his head again and he said, "it felt light". That's all he said. I didn't see anything unusual at that time.

He also asked my cousin, Lucille Hoff to look at his head and he said to her that he didn't feel good. Several times in the evening, he mentioned that he was hit with the cable at work. He made complaints that he had a light feeling up there and he asked for an aspirin because he said his head hurt when he laid across the bed. When he said up there, he indicated to the left side of his head.

He didn't complain to me on Friday and on Saturday morning he didn't say anything but he was more quiet. On Sunday when he was getting dressed for church, he didn't feel good. He asked me to look at his back but I didn't see anything. On Sunday he didn't make his usual comments, he didn't work puzzles. He just sat it out, and when supper came, he ate little. He did not complain.

On Monday morning, he said, "Don't make lunch for me, I'm not hungry" and I didn't. I didn't think that was funny until all this took place.

It was unusual for me not to pack a lunch for him. I packed one every day.

He came home Monday about 4:00. He picked up my daughter's baby and brought her in the basement. He took the baby back up stairs and he came to the top of the stairs in what could have been five minutes and said "Ag, I want to ask you something'.

He never said no more. He came right through the air like a shot, his head hit the pavement, the cement in the basement and he just went to his back.

My husband was an employee of the Chicago Grain Trimmers Association. He was a charter member and a stock holder in that organization. The President of the Grain Trimmers Association is Lawrence Banks who is a brother of John Banks. When I called Mr. Greenon in the morning, I told him about Thursday, January 26, that I remembered about John being hit on the head.

Cross Examination by Mr. Braun.

After I saw him fall, I couldn't say that I noticed any odor of alcohol and I couldn't say that I didn't.

42 In the days from January 26 to January 30, I no-
43 ticed unusual things about my husband as far as holding a real good conversation, there was none and if you ask him a question, you never got an answer. I didn't see anything unusual about his skin.

54 *Questioning by Deputy Commissioner Enos.*

On Monday, the 30th, I was in the basement. I only ironed a pair of pants. I wasn't washing clothes.
58 He stood at the top of the stairs and called to me and the next thing, he came flying down the stairs. He came head first. He never touched. You could have crawled under him. That's how high he stayed. He did not cry out.
60 From January 26th to January 30th, he would be normal but he was overly quiet. It could be that he was like he was depressed. He had a rugged skin. It would be hard to notice any change in his coloring. I didn't notice any palor.
62 Unusually on Sunday when he came home from church, he worked his puzzle. That day, he didn't. He usually worked five puzzles but that day he never worked one. He didn't complain. He spent a very quiet day.

155 DR. JOSHUA I. SPEIGEL, witness for claimant, Testified:

Direct Examination by Mr. Moses.

My name is Joshua I. Speigel. I reside at 6801 South Bennett Street. I am a licensed physician in
157 the State of Illinois. I had occasion to see John Banks in the South Chicago Hospital. I was called

158 in by Dr. Koehler. At the time I saw him I considered the possibility of a subdural hematoma and I saw him daily and then I had to leave the City with a sick patient.

161 From my own notes which are from the 3rd of February, I found the right upper extremity is paralyzed. He is confused and partially aphasic. There is a history of cranial injuries 3 days prior to the "cerebral vascular accident". I disagreed with them.

162 I was advised by the treating doctor, Dr. Koehler, of the previous injury 3 days prior to admission. The history was that 3 days prior to his having fallen down the steps, that he had injured himself, he had been struck on the side of the head by something heavy.

163 Following that, he complained of difficulty, cranial cerebral difficulty, headaches and other things. Based
164 on my examination, I came to the conclusion that the initial injury, that injury which occurred 3 days prior to the 30th of January, was the basic cause for his falling down the steps and sustaining the second injury.

165 Subdural hematoma such as this man had is a slow process. Contrary actually to what everybody else thinks, it is not caused by direct bleeding. There is only a small amount of bleeding. This bleeding doesn't generally kill or even give evidence of its presence.

Now, the clot breaks down in the center and forms a fluid of very high specific gravity. It is surrounded by a membrane which is the remainder of the clot. Right next to it is a great lake of fluid, cerebrospinal fluid. This is a perfect mechanism for osmosis. I am sure that everyone is acquainted with that.

There is no more bleeding. The liquid of very slow specific gravity, cerebrospinal fluid, almost like water, by osmosis, begins to fill up this sac. Over a period of time running from a few days to as long as three months, this begins to fill. There is a physical phenomenon that makes one fill more quickly than the other. This is called the latent interval. There even a mild injury, a very mild injury, such as bumping the head, can result in such a small clot which gradually grows by osmosis until it paralyzes the patient and kills him.

Therefore, it is my feeling that he had a cranial cerebral injury three days prior to the fall; that the subdural hematoma was developing at this time;
166 that he fell and as a result of it sustained further injury, but that the subdural hematoma was secondary to the initial injury.

Is that clear?

168 Hypothetical question by Mr. Moses:

Now, Doctor, assume that a man forty-nine years old, who is in good health and steadily employed, while in the course of his employment was struck on the left side of his head by a steel cable;

Assume further that the same evening a small dot about the size of a pencil dot appeared on his left eyebrow, over his left eyebrow and that he complained of headache;

That he was quieter than usual in his actions on the following three days, but he ate less than normal; that he went about his usual occupation on the following day after he was so struck on the head, the following day being Friday, a workday, and also that

he went about his usual occupation on the following Monday thereafter without complaint;

That on the afternoon of the third day, following
169 the said accident, while standing at the top of a flight of stairs leading to a basement, and while in the middle of a conversation, he suddenly stiffened up and fell down the said stairs, landing on the right side of his face and head; that the basement floor was concrete; that he was taken to the hospital immediately thereafter while still unconscious; that he was bleeding from a laceration at the right parietal region; that he responded only to painful stimuli when struck or stuck with a safety pin; that his blood pressure was 102/70, pulse 82 regular, and full, that his pupils were equal, round and medium wide; that his Achilles tendon reflexes and patellar reflexes were present; that a Babinski test was negative; that his right upper extremity appeared paretic; that all of his other extremities reacted to strong, painful stimuli; that there was no bleeding from his ears or nose; that he had a laceration at the right parietal region about one inch long, which was sutured; that on that same night that he was admitted to the hospital a spinal puncture was made and the spinal fluid was very bloody, and had a pressure of 300;

That on the second day in the hospital his condition worsened and he was more comatose; his reflexes were gone, his pupils were very narrow, and he had Shane's strokes breathing;

170 That on the third day in the hospital he remained in a deep coma and that on the fourth day in the hospital his right upper extremity was paralyzed and he was confused and partially aphasic; that on

the fifth day in the hospital his condition improved and the patient sat up and he came out of his deep coma but remained in a mild stupor; he was able to mumble words; his right upper extremity was paretic and his left lower extremity was paretic;

That on the ninth day in the hospital he was still irrational most of the time, but complained about distress in his upper abdomen;

That on the twelfth day in the hospital he got worse and was in a stupor; that he could not talk or understand orders; that a Babinski test was strongly positive at the left side; that on the 13th day that he was in the hospital, he died;

That an inquest was performed the same day that he died and the Coroner's physician found the following autopsy protocol:

"(1) Obliteration of right nasolabial fold.

"(2) Incised wound one-eight inch long over the right parietal region.

"(3) Area of depression of scalp about three-eighths of an inch in diameter over right parietal region.

171 "(4) Large hematoma below the scalp about one and one-half inches in diameter in right parietal region extending to the calvarium.

"(5) Small puncture wound over left parietal region—healed injury.

"(6) Massive subdural hemorrhage extending over entire left cerebral hemisphere.

"(7) Basal skull fracture extending from right parietal region to the cribiform plate of ethmoid bones.

"(8) Fracture through the posterior plate of the hypophysis.

"(9) Blood was found in ventricles of brain."

172 It is my opinion that there might or could be a causal connection between the hypothetical patient's injury by a steel cable and his death.

173 *Cross Examination by Mr. Braun.*

175 The massive subdural hemorrhage extending over the left cerebral hemisphere is also consistent with a severe trauma to the right side of the head. It is quite common that a severe trauma to the right side
176 of the head will cause a subdural hematoma to be formed on the left side.

178 Blood in the ventricles is consistent with serious brain damage, that is, lesions in the brain itself and consistent with severe trauma to the right side of the head.

179 All of the major findings on autopsy are consistent with a severe trauma to the right side of the head.

A subdural hematoma would not be diagnosed on the basis of the single complaint of headache.

180 It is correct to say when a subdural hematoma forms it can be very slow in forming and there may be no complaint whatsoever on the part of the patient initially. After it becomes larger, it manifests itself in clearing demonstrable signs. Once there are clearly observable clinical signs a subdural hematoma continues to progress. It cannot be stopped except by surgery. It is an operable condition and the patient can be cured.

181 As the subdural hematoma progresses, the pain of headache which is frequently present increases.

There is frequently headache and the patient becomes mentally obtundent, stuporous. Actually, that is one of the first observable signs except that one of the sides becomes partially paralyzed.

The paralysis does not invariably come on gradually. It can come on suddenly and the patient would
182 then have pain and he may pass out.

It is not the common thing that he would pass out suddenly. The slow bleeding of the subdural hematoma normally takes about two weeks before it is noticed but I have seen them at 3 months.

I have also seen them in a short time but that is an acute subdural hematoma which kills in a matter of hours. The acute subdural is a different phenomenon. It develops very suddenly, you have extensive bleeding in the subdural spaces and it kills. It is the type you would see occur in a couple of hours.

183 When a subdural hematoma is formed and is reaching a stage where it would cause some clinical signs, this would affect a man's reflexes and coordination.

185 I know that the grossly bloody fluid in the spine found when this man was taken to the hospital did not come from a subdural hematoma and the formation of a subdural hematoma does not make the spinal fluid bloody.

186 When we do a spinal puncture and find the fluid is grossly bloody, we know that there is a lesion in the brain itself and not the subdural space. The lesion is contiguous to the subarachnoid space or in the ventricles.

195 My associate saw this man at approximately 10:30 PM and he indicated that he did observe an odor of
196 alcohol. It was my associates impression when he

first saw the patient that his fall was associated with alcohol.

197 My associate diagnosed the condition as alcoholism with cerebral vascular accident, not surgical. I thought it was possibly surgical. The fact that I didn't write that in the record is of little significance.

198 A subdural hematoma is normally surgical, that is, it can be cured, most of them can be cured.

199 A laceration of the brain will normally cause bleeding into the spinal canal which would be evidenced by red blood when the spinal puncture is done. That condition is not surgical.

If this man had not had blood in the spinal fluid, I would have operated. A subdural hematoma could have been evacuated by surgery.

275 DR. ERIC OLDBERG called on behalf of respondent, Testified:

Direct Examination by Mr. Braun.

276 Qualifications of Dr. Oldberg.

277 Hypothetical question was propounded to Dr. Oldberg including a description of a 49 year old white male employed as a grain trimmer on January 26,
278 1961. Further, a description of the work; that a steel cable had broken on that day and a small red spot had been noted over the hypothetical man's left eyebrow but he continued to work; that a co-worker drove him from the elevator site to the company's office, nothing was said about anything unusual happening, he finished his normal work but a linear scratch was seen above the left eye and a co-worker
279 saw a black spot about the left eye. He got home

that evening, complained of a headache and took an aspirin. His brother looked at his forehead the next morning at work and saw a small black dot but the man said he felt alright. While working on that following day, his co-workers noted nothing unusual
280 about him and he made no complaint. On Saturday and Sunday he was at home, he spent a quiet day and did not work his puzzles as he usually did. On
281 Monday morning he went to work, he told his brother he felt alright and his co-workers noticed nothing unusual about him. On Monday he worked as a tripper at the Norris Elevator which required manual dexterity and coordination and his co-workers observed that he did the work in a normal fashion without complaint. The doctor further considered that he completed work for the day and went to a tavern
281 with a co-worker. He had at two or three beers and arrived home at approximately 4:10 PM during which time he made no complaint of ill-being. Thereafter, his wife observed him suddenly stiffen, fly through the air and strike his head on the concrete floor in the basement. The findings in the hospital record
282 were included in the hypothetical question as were
285 the findings on autopsy. The doctor gave his opinion that there was no connection between the man's work and the subsequent trauma at home. One of the
286 reasons for the opinion was all of the findings upon autopsy were findings created by blows of a relatively massive character, all consistent with the blow sustained by the head striking the concrete. Also, his
288 subsequent course for two weeks in the hospital is what one would expect in a person who had received a blow, such as striking the head on the basement

floor and, in other words, it would be far beyond the realm of medical certainty for the incident at work to be an inciting or etiological part in the subsequent developments. A four or five day interval
289 is a very, very short time for a subdural hematoma of any size to develop. When it does develop, it doesn't suddenly produce unconsciousness as appears to have been the case here. It acts a good deal like a brain tumor. It progresses slowly, enlarges, causes pressure and the patient slowly becomes stuperous. They begin devoloping neurological signs. They don't go along normally and then several days after the inciting cause lose consciousness. It doesn't occur.
290 People don't get subdural hematomas and go on normally for four or five days and then suddenly lose consciousness.

292 *Cross Examination by Mr. Moses.*

293 I can hardly conceive of a half inch cable inflicting a blow that would cause a subdural hematoma. If it were a blow of that force, it would have to leave some external evidence.

64 PATRICK KENNEDY called on behalf of claimant, testified:

I cannot say whether a cable hit or not. He did not make any complaint to me. He made no complaint
78 to me, all he said was would you look it up. I didn't hear John cry out. The only thing I saw was a tiny
85 speck above his eyebrow and when I worked with him on Monday, the 30th, I did not notice anything unusual about him and this was true during the three days, the 26th, 27th and the 30th.

95 JAMES GREENAN called on behalf of claimant, testified:

96 A cable broke on January 26th. I did not see John Banks get hit I didn't hear anybody say anything
99 about getting hit. John Banks made no complaint on that day or the next day, the 27th or on the following Monday, the 30th. He did his work in a normal manner on Monday morning, the 30th. On the late afternoon of that day, he made no complaints whatsoever.

101 THOMAS J. CURRAN called on behalf of claimant, testified:

105 On the 26th, I didn't notice anything unusual about John Banks. He made no complaint to me when I worked with him on the 30th at Calumet and didn't
106 notice anything unusual. He did his normal work.

115 LAWRENCE BANKS called on behalf of claimant, testified:

I am a brother of John Banks. I am president of
116 the Chicago Grain Trimmers Association. On January 26th, I saw him at Calumet Elevator and then at Gateway and I drove him home. My brother did not drive a car. He told me they didn't finish the
117 barge because there was a broken cable and they had to put on a new one so it delayed the job. He
118 said in fact, it got me. He mentioned his left tem-
119 ple. I didn't look at it at that time. I saw him the next morning at Gateway Elevator. He pointed to his left temple and I could see a little black speck, a very tiny particle and he said, that's a piece of that cable that got me. I saw him on Monday morning at 8:00 o'clock and he said that he was alright.

133 GEORGE GRABOWSKI called on behalf of claimant, testified:

134 On the afternoon of January 26, I saw John Banks in the office of the Grain Trimmers. He said he got hit with a cable at the Gateway Elevator. I did not
135 look at it. I did see a mark on his forehead, on the left hand side of the eye like a scratch. I believe it was red.

138 EDWARD J. WAGNER called on behalf of claimant, testified:

I saw John Banks on the morning of January 30.
139 John says, look, I got hit with a cable and I saw a little black speck on his forehead. That happened on
140 the Thursday before at Gateway. During all the time
141 that I worked with him on the 30th, he didn't complain.

146 FRANK COSTELLO called on behalf of claimant, testified:

I am a brother of Mrs. Agnes Banks. I had a conversation with John Banks in the afternoon of January 26th and he told me that he got hit by a cable. He did not show me any marks or bruises. The next
147 time I saw him was in the hospital.

245 JAMES H. WHALEN called on behalf of employer, testified:

I worked with John Banks on the 30th of January,
246 1961 at Norris Elevator and he made no complaint of feeling ill in any way. After work we went to a
247 tavern at 103rd and Avenue M. We could have had at least three beers and then I took John home. I

stayed at his home about 20 or 30 minutes at the
248 most. During this time he made no complaint of feeling ill.

252 JAMES HAWKINS called on behalf of employer, testified:

During the time I worked with John Banks on January 26th, I drove him from the elevator to the
253 office and he made no complaint of feeling ill and he said nothing about being injured. He didn't say anything to me about being injured when I saw him on the 27th and he did his work normally as far as I knew on the 30th when we worked at the Calumet Elevator.

255 EDWARD KOSIARA called on behalf of employer, testified:

I worked with John Banks on Monday, January 30th at Norris Elevator, 98th and the river. During
258 the afternoon on January 30th, he did not complain of feeling ill in any way and I did not notice anything unusual about him and he never told me about getting hurt.

261 Charles McKenna testified to action of cable in drawing, scoop to base of marine leg. He did work at Gateway Elevator on January 26, 1961, a Thursday.

26 DEFENDANT DEPUTY COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT.

Now comes the defendant Deputy Commissioner, by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and moves the Court to sus-

tain his compensation order herein appealed by plaintiffs, Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Co., and to enter judgment for the defendant deputy commissioner, dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that the defendant deputy commissioner is entitled to judgment on the record as a matter of law.

This motion is addressed to the assignments and specifications of error alleged to have been committed by defendant deputy commissioner and is based upon the certified copy of the transcript of proceedings held before the defendant as deputy commissioner, Bureau of Employees' Compensation, United States Department of Labor, on August 29, 1963 and October 1, 1963, in the matter of John J. Banks by Mrs. Agnes M. Banks, et al., Case No. 46-73 (Fatal), herein filed, together with exhibits therein.

/s/ Edward V. Hanrahan
United States Attorney

27 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Now comes the plaintiffs, Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co., by Klohr, Braun & Lynch, their attorneys and moves the court to enter judgment for the plaintiffs reversing and setting aside the award of the Deputy Commissioner as prayed in the Complaint and permanently enjoin the enforcement of said award on the ground that the award is barred by prior compromise, is without substantial foundation in the evidence and the action is barred by a prior determination of the claim.

In support of this motion plaintiffs submit an abstract of the proceedings before the Commissioner and their brief

and argument thereon and in addition submit to the court certified copies of motions filed by the defendant, Norris Grain Company, in case No. 61 C 1515, copy of which are attached hereto as Exhibts 1, 2 and 3 and in further
28 support of said motion plaintiffs submit copies of plaintiffs' answer to the claim filed before the Deputy Commissioner and plaintiffs' notice to the Deputy Commissioner that the claim would be controverted as plaintiffs' Exhibits 4 and 5, the originals of which are in the position of the Deputy Commissioner but were not certified to the court by the Commissioner.

/s/ Mark A. Braun
Klohr, Braun & Lynch,
Attorneys for plaintiffs

29 PLAINTIFF'S EXHIBIT NO. 1.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant,
vs.
Norris Grain Company, a corporation, Respondent.
No. 61 C 1515

MOTION.
(Filed May 1, 1963)

Now, at the close of all of the evidence introduced in behalf of the libelant herein, the libelant having rested, comes the respondent, Norris Grain Company, by Joseph W. Griffin and Karl M. Tippet, its attorneys, and moves the Court to instruct the Jury to find the respondent,

Norris Grain Company, not guilty and for reasons therefor shows unto the Court the following:

1. That there is no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

The respondent presents herewith and asks the Court to give to the Jury the following written instruction:

The Court instructs the Jury to find the respondent, Norris Grain Company, a corporation, not guilty.

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

31 PLAINTIFF'S EXHIBIT NO. 2.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant, vs. Norris Grain Company, a corporation, Respondent.	No. 61 C 1515

MOTION.
(Filed May 2, 1963)

Now, at the close of all of the evidence introduced in behalf of libelant and the respondent, comes the respondent, Norris Grain Company, by Joseph W. Griffin and Karl M. Tippet, its attorneys, and moves the Court to instruct the Jury to find the respondent, Norris Grain

Company, not guilty and for reasons therefor shows unto the Court the following:

1. That there is no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

The respondent presents herewith and asks the Court to give to the Jury the following written instruction:

The Court instructs the Jury to find the respondent, Norris Grain Company, a corporation, not guilty.

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

33 PLAINTIFF'S EXHIBIT No. 3.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant,
vs.
Norris Grain Company, a corporation, Respondent.
} No. 61 C 1515

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR FOR NEW TRIAL.
(Filed May 9, 1963)

Norris Grain Company, a corporation, respondent, by Joseph W. Griffin and Karl M. Tippet, its attorneys, moves the Court to set aside the verdict of the Jury and the judgment entered thereon, and to have judgment entered

in accordance with the respondent's motion for directed verdict for the following reasons:

1. That there was no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

3. That decedent's death was caused by his own negligence. Or, in the alternative, respondent moves the Court to set aside the verdict and the judgment entered theron and grant respondent a new trial for the following reasons:

A. The verdict is contrary to the law.

B. The verdict is contrary to the evidence.

C. The verdict is contrary to the law and the evidence.

D. The judgment is contrary to the law.

E. The judgment is contrary to the evidence.

34 F. The judgment is contrary to the law and the evidence.

G. Prejudicial error was committed by:

1. Refusing to admit into evidence admissions against interest made by decedent that on January 26, 1961, he was injured when struck in the head by a steel cable.

2. Restricting the cross examination of Dr. Joshua Spiegel, witness for libelant, so that evidence could not be put before the Jury concerning the hypothetical facts on which the doctor had previously given an opinion that the fall of the deceased and his death on January 30, 1961, was due to an injury received on January 26, 1961, which was contradictory to the opinion this witness gave in the trial of this suit that an injury received on January 30, 1961, was the cause of the decedent's fall and his death on that date, and in refusing to permit cross examination of this witness as to the reasons for his previously expressed contradictory opinion.

3. Restricting the cross examination and adverse examination of Agnes Banks, Administrator, concerning the alleged head injury received by the decedent on January 26, 1961, and her testimony at the hearing conducted by the Commissioner, hearing the Longshoremen's and Harbor Worker's Claim filed, based on an injury to the decedent's head received January 26, 1961.

4. Permitting libelant, over objection of respondent, to read into evidence the extremes of temperature and snowfall for the days, January 20 to 30th, inclusive, 1961, which were read from the United States Weather Report that concerned the entire Chicagoland area, without any reference in the report to such temperature and snowfall in the particular area where the alleged accident of January 30, 1961, occurred.

5. Refusing to permit respondent to introduce into evidence any testimony concerning the decedent's alleged accident of January 26, 1961, involving an alleged head injury, unless respondent would conclusively establish by such evidence that decedent received an actual injury to his head on January 26, 1961, despite decedent's admissions to Agnes Banks and others that he had received such an injury on January 26, 1961.

6. Refusing to grant respondent's motion to withdraw a juror submitted after prejudicial comments to the Jury made by the Court in explaining the Court's understanding of the theories involved in the suit, and in explaining the Court's reason for ruling as it did on respondent's objection to the admission into evidence of two monthly weather reports.

7. Permitting libelant's attorney, over objection of respondent, to argue to the Jury that Agnes Banks did not get anything out of the claim made under the Longshoremen's and Harbor Workers Act for the decedent's

alleged head injury allegedly received on January 26, 1961.

8. In instructing the Jury, over the objection of the respondent, that the doctrine of res ipsa loquitur applied, by giving the following instruction:

36 "The plaintiff has the burden of proving each of the following propositions:

"First: That the decedent just before and at the time of the occurrence was using ordinary care for his own safety.

"Second: That the decedent was injured in his person.

"Third: That the injury was received from a manila rope on a marine leg which had been under the defendant's management.

"Fourth: That in the normal course of events, the injury would not have occurred if the defendant had used ordinary care while the manila rope on marine leg was under its management.

"If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the manila rope on marine leg while it was under its control or management. If you do draw such an inference your verdict must be for the plaintiff if any injury or damage proximately resulted. But if, on the other hand, you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of others in its management of the manila rope on marine leg, then your verdict should be for the defendant."

9. In refusing to give for the respondent the following instruction:

"The libelant has the burden of proving each of the following propositions:

"First, that the decedent, John Banks, before and at the time of the occurrence was using ordinary care for his own safety;

"Second, that the respondent acted, or failed to act in one of the ways claimed by the libelant as stated to you in these instructions and that in so acting, or failing to act, the respondent was negligent;

"Third, that the decedent, John Banks, was injured.

37 "Fourth, that the negligence of the respondent was a proximate cause of the death to the decedent, John Banks.

"If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the libelant, but, if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the respondent."

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

Received a copy of the above and foregoing Motion for Judgment in Accordance with Motion for Directed Verdict or For New Trial this 8th day of May A.D., 1963, at the hour of 3:15 P.M.

/s/ Director & Liebenson

39

PLAINTIFF'S EXHIBIT NO. 4.

Form US-215

U. S. DEPARTMENT OF LABOR—BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner_____

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

Case No._____

Insurance Carrier's No._____

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

Agnes Banks, Widow of John J. Banks, Claimant

vs.

Chicago Grain Trimmers Association, Inc., Employer

New Amsterdam Casualty Company, Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is [denied / admitted] that applicant sustained an injury on or about the date set forth in the application.

2. It is [admitted / denied] that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is [admitted / denied] that the relationship of employer and employee existed at the time of the injury.

4. It is [admitted / denied] that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is [admitted / denied] that notice of injury was given employer as specified in application.

6. It is [admitted / denied] that applicant was permanently disabled to the extent stated in application.

7. It is [admitted / denied] that applicant was temporarily disabled for the period stated in application.

8. It is [admitted / denied] that the rate of wages as set forth in application is correct.

9. That the entire issue of the death of John J. Banks, Deceased, was related in any way to his employment at the Chicago Grain Trimmers Association, Inc. has been determined by the Deputy Commissioner in a previous hearing.

Signed_____

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personal or by mailing to the address in the claim.

Form CB-207

Form approved.
Budget Bureau No. 44-R062.

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

OFFICE OF DEPUTY COMMISSIONER _____
Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

Case No. _____

Insurance Carrier's No. _____

NOTICE TO THE DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to employee)

NOTE.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer Chicago Grain Trimmers Association, Inc.

2. Office address: Street and No. Lake Calumet Dock, City or town Chicago State Ill.

3. Name of injured employee John J. Banks

4. Present address: Street and No. 3520 E. 112th St., City or town Chicago State Ill.

5. Date of alleged injury or first illness from disease Unknown, 19__, ____ M.

6. Nature of alleged injury or occupational disease Decedent sustained fatal injuries when he fell down stairway at his home.

7. When was notice of injury received from employer? The employer was advised of this non-occupational fall 2 days after employee's death, 19__

8. This case will be controverted for the following reasons (State specific reasons to be relied upon):

The claim of the dependents of John J. Banks for any benefits that might be due them under the Longshoremen's and Harbor Workers' Compensation Act was heard and adjudicated by Deputy Commissioner R. C. Enos under his decision of June 8, 1961. This finding is final and completely determines the issue of whether John Banks' death resulted from an accidental injury that arose out of his employment.

9. Do you believe that disposition of a claim in this case can be made without the necessity for formal hearing? Yes (Yes or no)
The employer moves for the immediate dismissal of this claim for the reason that the issues alleged have been determined by the Commission

Name of Insurance Carrier New Amsterdam Casualty Company

Signed by _____

Official title Attorney

Dated 21 September, 19 61

16-42220-4 U.S. GOVERNMENT PRINTING OFFICE

41

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be determined before the Court, without jury, and upon cross-motions for summary judgment by the plaintiffs and the defendant, and the Court having considered the pleadings on file, briefs, and the transcript of proceedings before the defendant, Deputy Commissioner of Labor, and being fully advised in the premises makes the following:

FINDINGS OF FACT.

1. This action is an appeal by the Chicago Grain Trimmers Association, Inc., and its insurance carrier, New Amsterdam Casualty Company, seeking reversal of an award of compensation benefits made by the defendant, Depu-

42 ty Commissioner, R. C. Enos, to Agnes M. Banks.

2. This Court adopts as its findings of fact the statements of facts contained in the compensation order of the defendant, Deputy Commissioner, as more fully set forth in the entire record of proceedings before the Deputy Commissioner;

Wherefore, upon the foregoing facts this Court makes the following:

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter, pursuant to the Longshoremen's and Harbor Workers Compensation Act, as amended, 44 Stat. 1424, as amended.

2. There is no genuine issue of a material fact presented herein, and this action may properly be determined upon the cross-motions for summary judgment filed by the plaintiffs and the defendant.

3. There is substantial evidence in the transcript of administrative proceedings which supports the findings of

fact of the defendant, Deputy Commissioner, and the award based thereupon; and the decision and award of the defendant, Deputy Commissioner, was in accordance with law
43 and is therefore final and conclusive; this Court must therefore grant the defendant's motion for summary judgment and deny the plaintiff's motion for summary judgment, affirm the decision and award of the defendant, Deputy Commissioner of Labor, and dismiss the Complaint.

Enter: /s/ James B. Parsons
Judge

Dated: June 2, 1965.

44 ORDER ENTERED JUNE 2, 1965.

It is ordered and adjudged that, the defendant's motion for summary judgment is allowed; the plaintiff's motion for summary judgment is denied; the compensation order of the Deputy Commissioner is affirmed, and the action dismissed on the merits.

Enter: /s/ James B. Parsons

46 NOTICE OF APPEAL.
(Filed July 26, 1965)

Notice is hereby given that Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, corporations, plaintiffs in the above named cause, hereby appeal to The United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 2nd day of June, 1965.

Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Company, appellants
By: /s/ Klohr, Braun & Lynch,
Attorneys for Appellants

47 CERTIFICATE OF MAILING.

I, Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on July 26, 1965, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable Edward V. Hanrahan, U. S. Attorney
15th Floor U. S. Court House
Chicago, Illinois 60604
Attention: John Peter Lulinski, Chief Appellate Division
Frederick E. McLendon, Jr., Assistant U. S. Atty.

Harold A. Liebenson,
77 West Washington Street
Chicago, Illinois 60602

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 27th day of July, 1965
Elbert A. Wagner, Jr., Clerk
By: /s/ Gizella Butcher
Deputy Clerk

48 STIPULATION OF CONTENTS OF RECORD ON APPEAL.

Pursuant to Rule 12(e) the parties hereby designate the following for inclusion in the record on appeal to the United States Court of Appeals for the Seventh Circuit, taken by notice of appeal filed on July 26, 1965:

1. Statement required by Rule 12(c) of the United States Court of Appeals for the Seventh Circuit.
2. Plaintiff's Complaint filed February 20, 1964.

3. Answer of Defendant filed June 11, 1964.

4. Official report of proceedings had before Deputy Commissioner of the Tenth Compensation District of the United States Department of Labor, Case No. 46-71, Pages 1-304 and official report of proceedings, Case No. 46-73, Pages 1-263.

5. Defendant's Motion for Summary Judgment filed December 28, 1964.

49 6. Plaintiff's Motion for Summary Judgment filed March 22, 1965, including Exhibits 1, 2, 3, 4 and 5, filed in support of Plaintiffs' Motion for Summary Judgment.

7. Order allowing defendant's Motion for Summary Judgment and denying plaintiffs' Motion for Summary Judgment and Findings of Fact and Conclusions of Law entered June 2, 1965.

8. Notice of Appeal filed July 26, 1965.

9. Appeal Bond filed July 26, 1965.

10. Certified copy of docket entries.

Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co.,
Plaintiffs-Appellants
By: /s/ Klohr, Braun & Lynch,
their attorneys

R. C. Enos, Deputy Commissioner,
Defendant-Appellee
By: /s/ Edward V. Hanrahan,
U. S. Attorney

CERTIFICATE OF CLERK.

I, Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for

the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office on the dates designated in the table of contents, and together with a true copy of the docket entries as they appear in the official docket in this office and the Official Report of Proceedings before R. C. Enos, Deputy Commissioner of the Tenth Compensation District of the U. S. Department of Labor, in four (4) volumes, transmitted herewith under separate certificates for the sake of convenience, constitute the record on appeal, in the cause entitled: Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Company, Plaintiffs vs. R. C. Enos, Deputy Commissioner, Defendant, No. 64 C 306.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of September, 1965.

Elbert A. Wagner, Jr., Clerk
By: /s/ McClendon Grice,
Deputy Clerk

Respectfully submitted,

KLOHR, BRAUN & LYNCH,
39 S. LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Plaintiffs-Appellants.

MARK A. BRAUN,
Of Counsel.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Wednesday, July 13, 1966

Before

Hon. F. RYAN DUFFY, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
vs.
R. C. ENOS, Deputy Commissioner,
Defendant-Appellee.

No. 15342

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

In the
United States Court of Appeals
For the Seventh Circuit

No. 15342 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
v.
R. C. ENOS,
Deputy Commissioner,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 13, 1966

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* A determinative question presented in this appeal is whether the doctrine of res judicata should be applied to a claim for compensation death benefits filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, because of an administrative denial of a prior claim filed by the same dependents seeking similar relief.

This action was instituted under section 921 of the act to set aside an order of the deputy commissioner, Department of Labor, dated January 27, 1964, granting compensation death benefits to the widow and minor children of John J. Banks, deceased. The plaintiffs are the Chicago Grain Trimmers Association, the employer of Banks,

and the New Amsterdam Casualty Company, its compensation insurance carrier. After considering cross-motions for summary judgment, the district court entered judgment affirming the decision of the deputy commissioner. The court held that the deputy commissioner's findings were supported by substantial evidence in the administrative record and that his decision and award were in accordance with law.

Three issues have been presented in this appeal: (1) whether substantial evidence supports the finding of the deputy commissioner that an injury to the deceased employee during the course of his employment resulted in his death; (2) whether the entry of a remittitur by the administratrix of the deceased employee's estate in a third-party wrongful death action without the employer's consent constitutes a "compromise" within the meaning of the act, barring a claim for death benefits; and (3) whether a prior decision of the deputy commissioner that an injury allegedly sustained by the employee in the course of his employment did not result in his death bars a subsequent claim that a different injury sustained by the employee while at work resulted in his fatality. Because we are convinced that the plaintiffs should prevail on the third issue, our discussion will be confined to that point.

At the time of his death on February 12, 1961, John J. Banks was an employee of the Chicago Grain Trimmers Association. He had worked as a grain trimmer since 1934, loading and unloading grain-carrying barges and vessels. In the late afternoon of January 30, 1961, after returning from work, Banks was standing at the head of the basement stairs in his home. Suddenly he pitched forward, falling eleven steps. His head struck the concrete floor, causing injuries that resulted in death thirteen days later.

The first claim for compensation benefits, filed on February 20, 1961 by the widow, Agnes Banks, for herself and her minor children, alleged that Banks sustained an accidental injury at work on January 26, 1961 which caused his fall at home on January 30, thereby incurring other injuries which resulted in death. At the hearing on this claim there was testimony that the deceased was struck

by a cable on January 26 while working on a barge. Other witnesses, including several coworkers, testified that they did not see Banks suffer any accidental injury on that date and that during the subsequent three days he did not complain of illness. The deputy commissioner found that Banks died as a result of injuries incurred by the fall in his home, but that the evidence failed to establish that the fall was the consequence of an injury arising in the course of his employment. The claim for compensation was rejected.

On August 22, 1961, a second claim was filed by the widow in behalf of herself and her minor children alleging that Banks sustained an accidental injury on January 30, 1961 while working on a barge, which caused fatal injuries in his home on the same date. Shortly thereafter, the widow, as administratrix of her husband's estate, brought a wrongful death action in the federal district court against the Norris Grain Company.[1] She claimed that Norris was responsible for the breaking of a rope (which was stretched from a barge to a tower adjacent to one of its grain elevators) on January 30, 1961 which struck her husband on the head, eventually resulting in his death. The jury returned a verdict in her favor.[2]

Over the objection of the Grain Trimmers Association and its insurer, the deputy commissioner thereafter proceeded to entertain the second claim for compensation. Although jurisdiction to hear this application was challenged because of the prior finding that death had not resulted from employment, the deputy commissioner concluded that a hearing was justified because the claim concerned a different date of injury than that alleged previously. At this second hearing both parties presented testimony relating to the alleged occurrence of an accidental

[1] The complaint filed in the case at bar alleged that on September 21, 1961 at a pre-trial conference held by the deputy commissioner, counsel for the claimants requested that the hearing on the second claim be postponed pending disposition of the wrongful death action. In his answer, the defendant neither admitted nor denied the allegation.

[2] The verdict was in the amount of $30,000. The Norris Grain Company moved either to set aside the verdict or to grant a new trial. The district court indicated a new trial would be granted unless Mrs. Banks filed a remittitur in the amount of $11,000. The remittitur was filed, and a $19,000 judgment was entered and satisfied.

injury on January 30, 1961.[3] The claimants presented evidence that the rope, stretched from the barge to the tower broke and a "whole pile" fell on Banks' head. Witnesses for the employer denied knowledge of the rope breaking or of any complaint made by the deceased about the alleged incident. At the conclusion of the hearing the deputy commissioner found that the deceased suffered an injury while at work on January 30, 1961 producing an acute subdural hematoma, which caused him to fall down a flight of steps in his home two hours later. The deputy commissioner proceeded to make the compensation award challenged by the plaintiffs in the instant proceeding.

Turning to the question before us, both claims filed by the widow for herself and her minor children sought benefits under the compensation act for the death of the husband as the result of injuries sustained in his home. The only difference in the claims is that initially an accidental injury during employment on January 26 was asserted as being the cause of Banks' fall, whereas in the subsequent claim a predisposing accidental injury was alleged to have occurred on January 30, both in 1961. In the first hearing the evidence was directed to an alleged incident on January 26; in the second it was confined to the alleged incident on January 30. Although the claims presented different factual issues, these particular issues were intermediary to a determination of whether there was a causal relationship between the deceased's employment and the fatal fall in his home. The fall and the resulting injury and death were the ultimate occurrences upon which both asserted claims depended. This identity of ultimate issues constituted a single claim for compensation rather than two separate ones.

An analogous situation was present in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927). There a seaman employed aboard a vessel was injured by the fall of a strongback used to support a portion of a hatch. A libel was filed in

[3] No mention was made of the alleged January 30 incident at the hearing on the first claim. The widow testified at the hearing on the second claim that in February 1961 (prior to the first hearing) her son told her of a rope-falling incident at work on January 30 and that it was discussed by the family and with her attorney. She stated that she did not mention the January 30th injury at the first hearing, however, because "it was forgotten about, and it wasn't until even after the other trials," that she remembered having been told of the injury.

admiralty alleging that the injury was caused by negligence in failing to provide a safe place to work and to use reasonable care and by the unseaworthiness and the insufficiency of gear and tackle, and, in the alternative, if no negligence was established, for maintenance and cure. The federal district court found that the accident was not due to the negligence alleged, that is, the faulty design and construction of certain gear, but to the grossly negligent manner in which dunnage was removed from the hold. The court denied full indemnity by way of damages but awarded the cost of maintenance and cure. In a subsequent suit, the plaintiff sought recovery under the Jones Act alleging negligence of the ship's officers and employees in handling seaworthy gear. The plaintiff was awarded damages in the district court. The circuit court of appeals affirmed, but the Supreme Court reversed. In the course of its opinion, the Court first defined res judicata as follows:

> The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. 274 U.S. at 319.

Then, after referring to the opinion of the lower court that there was no identity of the causes of action because the grounds of negligence pleaded were "distinct and different in character," the Court declared:

> Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*'" *Ibid.*

In the instant case the two events which were alleged to have occurred during the decedent's employment resulted in but one actionable ground for compensation benefits, the fatal fall in the home, even though those events were distinct as to time and character. If the decedent had been struck on the head by a cable and seconds later had suffered a similar injury by a falling rope and the occurrences whether singly or in combination had caused his fall, the analogy of these supposed events with the several and distinct acts of negligence referred to in *Phillips* would be more obvious. Accordingly, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singly or in combination were alleged to have caused the fall in the home.

It would seem that this determination should call for an application of the doctrine of res judicata so as to bar the second claim. Although the defendant makes some effort to distinguish the issues because of the difference in the alleged predisposing injuries, his principal contention is that res judicata should not be applied because of the administrative nature of the proceeding. He maintains that the doctrine ordinarily has no application to decisions of administrative agencies, citing among other cases, *Churchill Tabernacle* v. *FCC*, 160 F.2d 244 (D.C. Cir. 1947), and *Niagara Mohawk Power Corp.* v. *FPC*, 202

F.2d 190 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239 (1954). As a corollary it is argued that this ought to be true particularly with respect to administrative actions in claims for workmen's compensation because policy considerations which may have influenced this type of legislation outweigh the need to put an end to litigation of the same issues between the same parties.[4]

There are many administrative decisions as to which res judicata does not apply, for reasons peculiar to the nature and subject matter of many administrative proceedings. In such cases the reasons underlying the doctrine are either not relevant or outweighed by other considerations, as an examination of the cases cited by the defendant will demonstrate. *Churchill Tabernacle* v. *FCC, supra,* for example, concerned the renewal of a license to operate a radio station. The court held that the Commission "is empowered to establish a new policy, and apply it to the renewal of an old license, despite the fact it is inconsistent with a previous decision. This follows from the statutory duty of the Commission to examine each application for renewal of license as an original proceeding and grant or refuse it in the public interest." 160 F.2d at 246. In *Niagara Mohawk Power Corp.* v. *FPC, supra,* the court refused to apply res judicata to an earlier decision by the Federal Power Commission (which the court characterized as an order that "amounted to nothing more than a refusal to agree to the licensee's proposal that the license be amended") on the principal ground that the prior administrative action was unreviewable.

On the other hand, there are many cases holding that res judicata should be applied to administrative decisions when there are justifiable circumstances present. For example, it has frequently been held that the decisions of

[4] The defendant asserts that Congress was so concerned with resulting inequities if full res judicata effect were given to compensation decisions under the act, that it amended section 22 of the statute, 33 U.S.C. § 922, to permit review of a compensation claim "because of a mistake in a determination of fact by the deputy commissioner" at any time prior to one year after its rejection. The defendant concedes that the provision has no direct application to this case because "the Deputy Commissioner was not aware of the January 30 injury until more than 'one year after the rejection' of the first claim." In any event, the section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing. *Flamm* v. *Hughes*, 329 F. 2d 378, 380 (2d Cir. 1964).

the Tax Court, an administrative agency, may be res judicata. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Fairmount Aluminum Co.* v. *Commissioner*, 222 F.2d 622 (4th Cir. 1955); *Lynch* v. *Commissioner*, 216 F.2d 574 (7th Cir. 1954). A determination of the National Bituminous Commission that a producer's coal was "bituminous," which had the collateral effect of subjecting the producer to a certain tax, was held to be res judicata in a suit to enjoin the collection of the tax. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). The doctrine was applied to an Interstate Commerce Commission decision in *Seatrain Lines, Inc.* v. *Pennsylvania R.R.*, 207 F.2d 255 (3d Cir. 1953). On this subject Professor Davis states, "The authorities that administrative determinations may be res judicata are much stronger and much more numerous than the authorities to the contrary."[5]

The problem, however, is to determine when an administrative finding is res judicata and when it is not. A number of tests have been suggested and applied.[6] It seems that no single test has evolved. One approach is to inquire whether the particular administrative proceeding under examination was essentially "judicial" in nature rather than "administrative." *Fairmount Aluminum Co.* v. *Commissioner*, *supra* at 627. Although this approach has been criticized,[7] it occurs to us that it is the most logical one to apply in the instant case. The ultimate factual issues would be the same whether presented in a claim for compensation under the act or in a wrongful death action filed in a court of law. Therefore the administrative process in this case was essentially judicial. Again we quote Professor Davis: "That the doctrine of res judicata should be applied in full force to some administrative action seems clear beyond question. The doctrine is at its best as it applies to an adjudication of past facts, where the second proceeding involves the same claim or the same transaction."[8] Here an adjudication of past events was required and, as we have demonstrated, the claims as to ultimate issues were identical.

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[5] 2 DAVIS, ADMINISTRATIVE LAW 554 (1958).

[6] See Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, WIS. L. REV. 1-42, 198-235 (1942).

[7] *Id.* at 38.

[8] 2 DAVIS, ADMINISTRATIVE LAW 559 (1958).

That a primary purpose of workmen's compensation legislation is to give greater protection and security to the employee and his dependents against injury or death occurring during employment and to remove the necessity of proving fault or negligence is not a sufficient reason to abrogate entirely the application of res judicata in compensation proceedings. Indeed the doctrine has been applied to the award as well as to the denial of claims under state workmen's compensation acts with respect to whether injury or death occurred during employment. *Trupasso* v. *McKie Lighter Co.*, 79 F.Supp. 641 (D. Mass. 1948); *French* v. *Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Hannah* v. *Oklahoma State Highway Comm'n*, 172 Okla. 221, 45 P.2d 53 (1935); *Doca* v. *Federal Stevedoring Co.*, 116 N.Y.S. 2d 25 (1952), *aff'd*, 305 N.Y. 648, 112 N.E.2d 424 (1953).

In summary, we hold that the deputy commissioner should not have entertained the second claim because it was barred by res judicata.

The judgment of the district court is reversed.